No. 93-797

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

STATE OF NEW YORK,

Petitioner,

against

ROBERT B. REICH, Secretary of the United States Department of Labor,

Respondent.

THOMAS A. CONSTANTINE, As Superintendent of the Division of the New York State Police; DIVISION OF THE NEW YORK STATE POLICE; STATE OF NEW YORK,

Petitioner,

against

GERALD J. LONG, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Are Investigators of the Bureau of Criminal Investigation of the New York State Police, who conduct investigations of only the most serious crimes and who have discretion to determine the need for and amount of overtime work according to the dictates of the particular criminal investigation, exempt under the United States Department of Labor regulation (29 C.F.R. § 541.2) defining the "administrative" exemption to the overtime requirements of the Fair Labor Standards Act, or are they non-exempt "production workers?"

2. If such employees are non-exempt under the Department's regulations, is the Department of Labor regulation defining the administrative exemption invalid as applied as arbitrary and capricious, inconsistent with clearly expressed congressional intent that criminal investigators are exempt from the overtime requirement of the Fair Labor Standards Act because the hours of work cannot be effectively controlled by the employer, and at odds with the Tenth Amendment?

3. If the regulation were not otherwise invalid, does the application of the regulation drafted in the 1940's, before the Fair Labor Standards Act was even applicable to the States, to require payment by the State of overtime under the Fair Labor Standards Act to Investigators violate the State's sovereignty under the Tenth Amendment by seriously impeding the State's ability to structure the Bureau of Criminal Investigation in the manner the State deems most efficient and effective to fight crime and protect its citizens?

List of Parties

In addition to the parties listed in the caption, the parties to this proceeding both before this Court and the courts below are as follows:

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No.

IN THE

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OCTOBER TERM, 1993.

STATE OF NEW YORK,

Petitioner,

v.

ROBERT B. REICH, Secretary of the United States Department of Labor,

Respondent.

THOMAS A. CONSTANTINE, As Superintendent of the Division of the New York State Police; DIVISION OF THE NEW YORK STATE POLICE; STATE OF NEW YORK,

Petitioner,

v.

GERALD J. LONG, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

The petitioners, the State of New York, the Division of New York State Police and Thomas A. Constantine, as Superintendent of the Division of State Police, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on August 23, 1993.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 3 F.3d 581 (2d Cir. 1993), and is annexed as Appendix "A." The opinion of the district court is reported at 807 F. Supp. 919 (N.D.N.Y. 1992), and annexed as Appendix "B."

Jurisdiction in this Court

The judgment of the Court of Appeals sought to be reviewed was rendered August 23, 1993. No petition for rehearing was sought. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1) providing for review of cases in the courts of appeal by writ of certiorari.

Constitutional, Statutory and Regulatory Provisions Involved

United States Constitution Amendment X; 29 U.S.C. §§ 207(a)(1), 207(k), 213(a)(1); 39 U.S.C. §§ 404(a)(7), 3523(a) (superseded); 29 C.F.R. §§ 541.2, 541.205, 553.216; 39 C.F.R. §§ 224.3 (1992), 224.7 (1976), 232.5 (1976), 233.1 (1991). These provisions are set forth in pertinent part as Appendix "C."

Statement of the Case

Procedural History

In four separate complaints, plaintiffs, the United States Department of Labor (DOL) and several hundred Investigators and Senior Investigators of the New York State Police Bureau of Criminal Investigation (BCI), sued the State of New York and the Division of State Police claiming that the failure of the New York State Police to pay overtime to BCI Investigators and Senior Investigators violated the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* (FLSA).[1] The State maintained: 1) that Investigators are exempt under the administrative exemption and Senior

[1]The three cases commenced by private plaintiffs, *Long v. Constantine, Ahern v. State of New York* and *Moran v. State of New York,* were consolidated in the district court. Defendants' motion to consolidate these cases with the case commenced by the Secretary of Labor, *Reich v. State of New York,* was denied, but the cases were nevertheless (Footnote continued on next page.)

Investigators are exempt under the administrative and executive exemptions in 29 U.S.C. § 213(a)(1) as defined by regulation at 29 C.F.R. § 541.2; 2) that, if these employees are not exempt under the regulation, the regulation is invalid as applied; 3) that, if the regulation as applied in this case validly requires payment of overtime to these employees, it violates the State's sovereignty under the Tenth Amendment; and 4) insofar as the private plaintiffs seek an award of back pay, it is barred by the Eleventh Amendment.

At the close of discovery the parties cross-moved for summary judgment on the issue of liability. By decision and orders dated December 8, 1992, the district court denied defendants' motions for summary judgment and granted plaintiffs' motions with respect to Investigators only (A 22).[2] The court's orders enjoined defendants from claiming the administrative or executive exemptions under the FLSA with respect to current or former Investigators (A 42).[3] The Court of Appeals for the Second Circuit affirmed (A 1).

Jurisdiction

Jurisdiction exists in the district court under 29 U.S.C. § 216 which specifically provides jurisdiction to the district court to hear cases alleging violations of the Fair Labor Standards Act, and under 28 U.S.C. § 1331, federal question jurisdiction.

Background and Facts[4]

The New York State Police is a division of the Executive Department of New York State which is headed by the Governor.

(Footnote continued.)
litigated on the same schedule. Both the district court and the Court of Appeals decided the cases in a single opinion, though the district court issued two separate orders, one in the consolidated private cases and one in the case brought by the Secretary of Labor.

[2]Numbers in parentheses preceded by "A" refer to pages of the Appendix.

[3]Only the administrative exemption is at issue on this writ.

[4]The facts set forth below are as they existed prior to the district court's injunction. As a result of the injunction in this case, to minimize the risk of an overwhelming damage award and penalties, certain changes by necessity have been made in how BCI Investigators work overtime to bring the system in compliance with a time and one half overtime system.

N.Y. Executive Law §§ 30, 31, 210. The Division of State Police ("the Division") is headed by a Superintendent appointed by the Governor with the advice and consent of the Senate. *Id.* § 210. The organization and structure of the State Police is to a large extent defined by statute. *See* N.Y. Executive Law, Article 11 and § 215. The duties and powers of the Superintendent and members of the State Police are likewise set forth by the State Legislature in N.Y. Executive Law § 223.

Of the close to 4000 sworn members of the Division, the vast majority, nearly 3100, are in the Uniformed Force, in ranks from Major to Trooper. The Uniformed Force is the "front line," performing the highly visible, day-to-day patrol, general law enforcement and first responder functions of the State Police. Of the nearly 3100 members of the Uniformed Force, over 2400 are Troopers, the bottom of the rank structure. Troopers work in three rotating "shifts" so that there is a continuous 24-hour-a-day patrol presence. Troopers drive marked State Police vehicles, which they must leave at the station at the end of their shift. Troopers are paid overtime at the rate of time and one half for all overtime hours.

In contrast to the Uniformed Force, the other major unit of the New York State Police is the Bureau of Criminal Investigation. The BCI is specifically authorized by the New York State Legislature in N.Y. Executive Law § 216, which states in relevant part:

> 1. The superintendent may continue, within the New York State Police, a bureau of criminal investigation and assign to it members of the New York state police in such numbers and appoint to it such investigative specialists in such numbers as may be required for the purpose of preventing, investigating and detecting violations of the criminal laws of the state, and conducting such other investigations as may be provided for by law. . . . Upon request of the head of any state department, or of any police agency or of any district attorney within the state, the superintendent may assign to such requesting authority members of the state police attached to the bureau of criminal investigation in such numbers and for such periods of time as he may deem necessary for the purpose of investigating and detecting felonies committed within the state. Members of the state

police assigned or appointed to the bureau of criminal investigation are empowered to cooperate with departments of the United States government in the investigation of violations of the federal laws of the grade of felony within this state. The superintendent may, from time to time, establish headquarters or stations in such localities of the state as he shall deem most suitable for the efficient operation of the bureau of criminal investigation.

There are slightly over 900 members in the BCI. Within the Division, the BCI carries out the major assignments of the State Police, investigating the most serious crimes and those areas identified by the Superintendent as areas especially targeted for eradication such as narcotics and organized crime. The BCI also handles such other special investigations ordered directly by the Governor.

The BCI has a decentralized deployment with units in each of the 10 Troops in the State except Troop "T" (which patrols the New York State Thruway), and in a variety of "special details." The present structure of the BCI was developed in 1961 by former Superintendent Arthur Cornelius, a former FBI Agent. The structure of the BCI is designed to maximize its efficiency and effectiveness as is required by section 216 of the Executive Law. The BCI is structured in a fashion similar to the Federal Bureau of Investigation and the Drug Enforcement Agency, to which the BCI is also very similar in function and sophistication. In fact, in the areas of narcotics and organized crime, two of the major assignments of the Division handled by the BCI, the BCI has long worked side-by-side with investigators from the Drug Enforcement Agency, the Federal Bureau of Investigation and other federal agencies. Because of the high level of professional competence of the BCI and because the BCI structure allows effective participation with federal agencies which are similarly structured, the BCI is also regularly requested to participate in joint operations with other federal investigative agencies, such as the Internal Revenue Service, Customs, Bureau of Alcohol Tobacco and Firearms and the Immigration and Naturalization Service.

BCI Investigators and Senior Investigators are not scheduled to work rotating shifts as are Troopers. Scheduling is a flexible matter generally left to the discretion of the Senior Investigator in charge of

each unit. Each unit is free to set up a schedule that is best suited to the needs and conditions of its particular work. Notwithstanding the schedule, Investigators are expected to do whatever is necessary and work whatever hours are necessary, usually at their own discretion, to complete their jobs successfully.

BCI Investigators do not wear uniforms and are provided unmarked cars which they use as they deem necessary for the performance of their jobs. Investigators are not required to leave the cars at the station for the next "shift," but take them home for use in investigations whenever necessary. BCI Investigators do not patrol and often do not know where their investigations will require them to go to solve a case.

The BCI has been deliberately structured to emphasize flexible work schedules for Investigators to promote self-reliance, avoid intensive direct supervision of investigations and to provide the broadest possible grant of discretion to members involved in carrying out the Division's major assignments. As Congress has found with federal criminal investigators (see discussion, *infra*, pp. 17-21), the State has determined that this structure maximizes the effectiveness of the BCI given its function, by allowing continuity of personnel on each investigation and assuring that sufficient resources are available to conduct investigations of serious matters promptly, which markedly increases the chances of success.

It is often necessary to a successful investigation that an Investigator work more than eight hours in a particular day. An Investigator may work overtime to interview people, conduct surveillance, follow leads, or do things that cannot be done during the eight hour day or that an Investigator decides is too important to the investigation to leave for the next day. In most situations, BCI Investigators decide without prior approval or direction to work overtime. Indeed, the Investigator's supervisor is, in most cases, unaware that an Investigator has determined to work overtime on any particular occasion.

While Investigators are not paid for unscheduled overtime at time and one half of their regular rate, under a contract between the BCI Negotiating Unit and the State, in addition to a base pay of $41,767 per year, BCI Investigators receive a premium in lieu of overtime of $5,760. This amount is intended to cover all unscheduled overtime hours worked in the discretion of the Investigators. Scheduled

overtime hours were at all relevant times paid at one and one half times the regular rate.

BCI closure rates, that is, the percentage of crimes solved, significantly exceed the national average for virtually all serious and violent felonies.

As stated in the record, in the view of the Superintendent of State Police, change to a straight overtime compensation system would severely diminish the flexibility and effectiveness of the BCI because restrictions would need to be placed on the hours of overtime worked by Investigators to stay within budgetary overtime limits. Other police agencies which pay investigators on a time and one half overtime basis have had to cease working on criminal investigations simply because the money for overtime was not available or authorized. Rather than cover all bases in an investigation, alternatives would be weighed to a large extent based on their cost. Those alternatives not appearing to be immediately fruitful might not be pursued. Cases are solved, however, by being complete and exhaustive and covering all bases. What appear to be "dead-ends" may become case-breaking leads. Under a time and one half overtime system, freedom to pursue such exhaustive investigations would be restricted by concern about costs. Such restrictions would severely diminish the effectiveness of the BCI by reducing the discretion and initiative necessary for successful investigation.

Decisions Below

The District Court

In reaching its decision that defendants could not claim the administrative exemption for Investigators, the district court applied the "short test" set forth in the regulation governing the administrative exemption, 29 C.F.R. § 541.2(e)(2), applicable to persons earning salaries in excess of $250 a week (A 34). Under this test, an employee is exempt from overtime if the employee's primary duty consists of "the performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers" and the work "includes work requiring the exercise of discretion and independent judgment" (A 34).

The district court held that Investigators were not exempt because they did not perform work "directly related to management policies or general business operations" as that term is interpreted in a DOL interpretive regulation, 29 C.F.R. § 541.205, which draws a distinction between "production" work and "administrative activities" (A 34-38). The court did not address any of the other requirements of the exemption. The court implicitly rejected the State's challenge to the validity of the regulation as applied. Finally, the court rejected the State's Tenth and Eleventh Amendment arguments (A 39-41).

The Court of Appeals

The Court of Appeals agreed with the district court that the "primary activities of Investigators place them squarely on the 'production' side of the line" (A 14). The court therefore held that the Investigators were not exempt from the overtime provisions of the FLSA. While recognizing "that a straight overtime compensation system may affect the flexibility and effectiveness of the BCI" (A 17), the court rejected without discussion defendants' challenge to the constitutionality of the regulation as applied.

The Court of Appeals rejected the State's Tenth Amendment challenge, holding that the Tenth Amendment was not implicated because the State had not alleged that it had been " 'deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless' " (A 18, quoting *South Carolina v. Baker,* 485 U.S. 505, 513 [1988]).

The Court of Appeals also rejected the State's Eleventh Amendment argument, holding that Congress made its intent to abrogate the States' sovereign immunity clear in the language of the FLSA. The State does not seek review of this holding.

Reasons for Granting the Writ

The facts and circumstances of this case present a compelling basis for review by this Court. The holding of both the district court and the Court of Appeals that BCI Investigators were not exempt under the "administrative" exemption to the overtime requirements of the FLSA is strikingly at odds with the following undisputed facts, *which were virtually ignored by the courts below:*

—Since 1974 when the FLSA was made applicable to the federal government, virtually all federal agencies have classified their investigators as exempt from the overtime requirements of the FLSA under the administrative exemption. This includes, for example, the FBI, which has classified all of its non-supervisory Special Agents as exempt under the administrative exemption.

—The Department of Labor itself, one of the plaintiffs in this case, and the agency primarily responsible for administering the FLSA, has classified its own investigators as exempt under the administrative exemption ever since the FLSA was made applicable to federal employees.

—The Department of Labor, in addition, has approved the exemption under the administrative exemption of United States Postal Inspectors, who have criminal investigative duties in substance virtually identical to those of BCI Investigators.

—The exemption under the administrative exemption of Postal Inspectors—even those engaged in "pure law enforcement" activities—has been upheld by both a three judge panel of the United States Court of Claims and by the Eighth Circuit Court of Appeals. The decision of the Second Circuit is in direct conflict with the decisions of these courts.

—Most significantly, Congress has recently and repeatedly indicated its agreement with the exemption of federal criminal investigators from the overtime requirements of the FLSA due to the unique nature of the job responsibilities of criminal investigators. In recognition of the FLSA overtime exempt status of criminal investigators and the fact that investigators are not paid at one and one half times the regular rate for all overtime hours worked, Congress has twice recently acted to raise the pay of federal criminal investigators in other ways.

The decision of the Second Circuit completely ignored these facts supporting the conclusion that BCI Investigators are exempt under the administrative exemption of the FLSA. But not only is the result reached below inconsistent with the federal government's treatment of its own investigators under the FLSA, with the application of the FLSA by the Department of Labor to its own investigators and to Postal Inspectors, with decisions of the Court of Claims and the Eighth Circuit Court of Appeals, and with the clear intent of Congress, the result constitutes a severe intrusion on the ability of

the State of New York in its sovereign capacity to deploy and operate the criminal investigative unit of its State Police in the manner the State deems most effective and efficient to fight crime and keep the peace.

In considering the question of whether BCI criminal investigators are exempt under the FLSA and the applicable regulation, the Court of Appeals failed to accord the significant issue of state sovereignty present in this case the appropriate weight to which it is entitled under the holding of this Court in *Gregory v. Ashcroft,* ____ U.S. ____, 111 S. Ct. 2395, 115 L. Ed.2d 410 (1991). Instead of following the teaching of this Court in *Ashcroft,* or even addressing the matters set forth above, the court held that BCI Investigators were not exempt because they could be considered "production workers" of the BCI under the DOL interpretative regulation set forth in 29 C.F.R. § 541.205.

The "production worker" analogy of the interpretive regulation is inapplicable to the work performed by criminal investigators, or alternatively, the regulation if so construed is arbitrary and capricious as applied to these employees.

Title 29 U.S.C. § 213(a)(1) provides that the overtime provisions of the FLSA do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity (as such terms are defined and delimited from time to time by regulations of the Secretary. . . .)." DOL has defined the § 213 (a)(1) exemptions in 29 C.F.R. Part 541. Subpart A sets forth the "General Regulations" and Subpart B is entitled "Interpretations" and contains the text of a 1949 "explanatory bulletin which interprets the regulations in the light of their application to specific factual situations." *See* 14 Fed. Reg. 7707, 7730 (1949).

The regulations and interpretations defining the administrative exemption were based principally on proposals and comments submitted at hearings by the manufacturing sector of the economy, and, with only one substantive exception, have remained substantially unchanged from when they were originally drafted by

DOL in 1940 and 1949.[5] Since the law was not applicable to them, state and local governments did not appear at the hearings in either 1940 or 1949. Although DOL has acknowledged that government employees are different for FLSA purposes and that the old regulations are "inadequate" for the public sector, see 56 Fed. Reg. 45824, 45828 (1991); 57 Fed. Reg. 37671, 37673 (1992), with the exception of regulations governing the salary element of the regulations, DOL has not revised the exemption regulations to take into account the special circumstances of public employees generally or criminal investigators specifically.[6]

Thus, the "production worker" interpretation of the administrative exemption was developed by DOL decades before the FLSA was even applicable to state and local governments. The outdated analogy is inapplicable to the job of criminal investigator and has never been applied by federal agencies, including DOL, or by Congress to federal criminal investigators. The application by the Court of Appeals here to deny the exemption to BCI Investigators in

[5]*See Report and Recommendations of Harold Stein, Presiding Officer, in the Matter of Proposed Amendments to Part 541 of Regulations With Respect to the Definition of the Terms, "Executive, Administrative, Professional . . . Outside Salesman,"* dated October 10, 1940, reprinted in CCH *Labor Law Reports* (1947 Ed.) ¶¶ 31,302 *et seq.* (pages 31, 301-31, 340) at ¶ 31,302.01; *Report and Recommendations on Proposed Revisions of Regulations, Part 541, defining the terms "Executive", "Administrative", "Professional", "Local Retailing Capacity", "Outside Salesman"*, dated June, 1949 (United States Government Printing Office).

[6]As originally enacted, the phrase within the parentheses of 29 U.S.C. § 213(a)(1) read only "as such terms are defined and delimited [by the Secretary]." The phrase "from time to time" was added in 1961. Although there are other delegations of rulemaking authority in the FLSA (*e.g.*, 29 U.S.C. § 207(e)(3)(b) and (c)) and other laws, and the phrase "from time to time" appears elsewhere in the United States Code, nowhere else in the Code does the precise phrase "as defined and delimited from time to time" appear other than in the exemption provision of the FLSA. By use of this unique language in the parenthetical phrase in § 213(a)(1), it appears that Congress contemplated that DOL would amend the regulations periodically to deal with relevant changes in the application of the FLSA, rather than to set regulations in stone in 1940 and let them stagnate.

the face of overwhelming indications that such an interpretation is improper and illogical warrants reversal by this Court.

Federal agencies have long exempted their own investigators from the overtime requirements of the FLSA.

Unlike many federal laws, which Congress has seen fit to apply to the States but not to the federal government, federal employees are subject to the FLSA. Under 29 U.S.C. § 204(f), however, the Federal Office of Personnel Management (OPM), not DOL, is authorized to administer the provisions of the FLSA for most federal employees, with some exceptions, most notably Postal Service employees for whom DOL administers the FLSA, as discussed below.

Although OPM administers the system, each federal agency is responsible itself for the classification of its own employees for FLSA purposes. OPM's role is to issue regulations and guidelines, to offer guidance and to resolve complaints made by employees, but it is up to each agency to apply the regulations and guidance to its own employees.

Under OPM's regulations and guidelines, federal agencies classifying their employees for overtime eligibility under the Act have since 1974 classified persons in the GS-1811 criminal investigator series as exempt from overtime under the FLSA under the administrative and executive exemptions.[7] For example, the Federal Bureau of Investigation has classified its 10,000 Special Agents, all in the GS-1811 criminal investigator job classification, as exempt under the administrative and executive exemptions.[8] The Drug Enforcement Administration classifies its over 4,000 Investigators in the GS-1811 series as exempt.[9]

[7]The executive exemption applies only to investigators with supervisory responsibilities.

[8]See defendants' exhibit "F" in the record which is a deposition of an FBI official produced pursuant to subpoena, as well as relevant job descriptions and classification justifications.

[9]See defendants' exhibit "G" in the record. Other federal agencies that have classified persons in these series as exempt from the FLSA overtime provisions include, among others, the Bureau of Alcohol, Tobacco and Firearms, Internal Revenue Service, Secret Service, (Footnote continued on next page.)

Investigator positions in these agencies have job responsibilities and duties and perform activities that are very similar, if not virtually identical in some cases, to those of BCI Investigators. As noted above, BCI Investigators often work with federal criminal investigators in joint investigations.[10]

DOL itself has at all times exempted its own investigators from the overtime requirements of the FLSA.[11]

DOL, as other federal agencies, makes its own determinations regarding the exempt status of its employees under the FLSA. The Wage and Hour Division of the Employment Standards Administration of DOL (the Division) was created by Congress. 29 U.S.C. § 204(a). The Administrator of the Division is appointed by the President. The Division's primary function is to enforce the labor laws relating to wages and hours, including the laws regarding overtime. *Walling v. Shenandoah-Dives Mining Co.*, 134 F.2d 395, 397 (10th Cir. 1943). The Division is made up primarily of Wage and Hour Compliance Specialists, also called "investigators" by the Division. The primary function of the Division investigator is to enforce the laws the Division is required to enforce. In other words,

(Footnote continued.)
United States Custom Service, Department of Interior-Bureaus of Land Management and of Indian Affairs, Department of Interior-Fish and Wildlife Service, and National Oceanic and Atmospheric Administration. Copies of the oral and written depositions and job descriptions for these agencies are in the record collectively as defendants' exhibit "AA."

[10]Although trial court decisions have held that certain federal law enforcement employees classified as exempt by federal agencies are not exempt, none of the cases involves the GS-1811 criminal investigator position and none of the cases considered all the arguments raised by the State in this case specifically with respect to the appropriate FLSA status of criminal investigators. The State does not contend and has never contended that all law enforcement employees are or should be exempt under the FLSA. In fact, the majority of the Uniformed Force of the State Police are eligible for and receive time and one half overtime under the FLSA.

[11]Support for the facts set forth below is found in the record in defendants' exhibits "C" and "H" through "O," which are depositions of DOL officials and DOL job descriptions.

these investigators perform the day-to-day substantive or "principal line work" of the Division. Job descriptions for these investigators reflect a close similarity between the basic job duties of DOL investigators and Investigators for the State Police.

Since 1974 when the FLSA was made applicable to the federal government, DOL has classified the non-supervisory Wage and Hour Compliance Specialists, grades 9, 11 and 12, as *exempt from the payment of overtime under the "administrative" exemption.*[12]

DOL also employs approximately 200 persons in the GS-1811 series as criminal investigators in its Inspector General's office. The Inspector General, a position created by Congress in 1978, is "basically a law enforcement official." Senate Report No. 95-1071, p. 14 (1978), reprinted in 1978 *U.S. Code Cong. & Ad. News,* at p. 2689. According to the job description, within DOL, the Inspector General "plans, develops, supervises and conducts investigations into alleged or suspected violations of the criminal laws of the United States, ..."[13] Criminal investigators for DOL carry out "the full range of investigative functions on assigned cases." The personnel office of DOL's Inspector General's Office has classified this position, in grades 9 and above, as exempt from the payment of overtime.

DOL has previously interpreted the administrative exemption as exempting government investigative employees.

Shortly after the FLSA was extended to government employees in 1974, DOL issued an opinion letter that concluded that Public Defender Investigators and Probation Officers who exercised sufficient discretion and independent judgment met the conditions for the administrative exemption. Opinion Letter No. WH-292, October 8, 1974 (A67).

In 1976, DOL concluded that United States Postal Inspectors met the test for the administrative exemption. *See Sprague v. United States,* 677 F.2d 865 (Ct. Cl. 1982); *Dymond v. United States Postal Service,* 670 F.2d 93 (8th Cir. 1982). Among the duties and powers of the Postal Service is the power to "investigate postal offenses and civil matters relating to the Postal Service." 39 U.S.C. § 404(a)(7)

[12]Grades 13 and 14 are exempt under the executive exemption.

[13]See defendants' exhibit "O," DOL Inspector General, GS-1811 criminal investigator job descriptions.

(A52). Postal Inspectors generally perform these functions. *See Sprague*, 677 F.2d at 865.[14]

After *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), it appears that DOL's interpretation of the administrative exemption as applied to investigative type positions initially remained consistent with its earlier interpretation that such positions were exempt.[15] Subsequently, DOL appeared to change its view and began issuing opinion letters concluding that "investigator" and similar governmental positions did not come within the administrative exemption because they performed the "production work" of their organizations. *See, e.g.*, DOL Wage and Hour Opinion Letter dated February 1, 1988 (no number assigned) (A68); *Taylor-Callahan-Coleman Counties v. Dole*, 948 F.2d 953, 955 (5th Cir. 1991).

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[14]The regulation in effect at the time of the *Sprague* and *Dymond* lawsuits described the functions of the Inspection Service as follows, 39 C.F.R. § 224.7 (1976) (A64):

> The Inspection Service is responsible for protection of the mails, enforcement of postal laws, plant and personnel security, postal inspection, and internal audits. The Inspection service, in accordance with applicable policies, regulations, and procedures, carries out investigations and presents evidence to the Department of Justice and U.S. Attorneys in investigations of a criminal nature. It also undertakes operating inspections and audits for the Postal Service. The Chief Inspector acts as security officer and defense coordinator for the Postal establishment, maintaining liaison with other investigative and law enforcement agencies of the Government.

The current regulation, 39 C.F.R. § 224.3 (1992) (A62), is substantially similar. Former Title 39 U.S.C. § 3523(a) (A52), which was omitted in the reorganization of the Postal Service in 1970, described the position of postal inspector to include investigative duties similar to those of Investigators for the BCI. Postal Inspectors have the power of arrest. *See, e.g.*, 39 C.F.R. § 233.1 (1991) (A65); 39 C.F.R. § 232.5 (1976) (A65).

[15]In the record below, there is correspondence dated August, 1986, from the Sacramento, California office of DOL appearing to reflect DOL's view that criminal investigators for the State of Nevada were exempt under the administrative exemption.

These later opinion letters fail to take into account or address how federal agencies, including DOL itself, have interpreted the administrative exemption and classified their own investigators, how Congress views the overtime status of criminal investigators, or even attempt to explain why DOL's later opinion letters differ from DOL's conclusions with respect to Public Defender Investigators and Postal Inspectors.

The decision of the Court of Appeals is in direct conflict with decisions of the Court of Claims and the Eighth Circuit Court of Appeals.

Both a three judge panel of the Court of Claims and the Eighth Circuit Court of Appeals upheld the exemption by the Postal Service, approved by DOL, of Postal Inspectors against a challenge by the affected employees. *Sprague v. United States,* 677 F.2d 865 (Ct. Cl. 1982); *Dymond v. United States Postal Service,* 670 F.2d 93 (8th Cir. 1982). Although Postal Inspectors enforce the postal laws, one of the statutory missions of the Postal Service, the courts in these cases had little difficulty in agreeing with the position of both the Postal Service *and the Wage and Hour Administrator of DOL* that such employees "have as their primary duty the performance of work directly related to the general business operation of their employer. . . ." *Sprague,* 677 F.2d at 868. These courts, therefore, concluded that "postal inspectors, *even those engaged in 'pure' law enforcement roles,* are administrative employees within the meaning of 29 U.S.C. § 213(a)(1)." 677 F.2d at 869 (emphasis added).[16] *See also Dymond,* 670 F.2d at 96: "In view of the wide range of the inspectors' duties and responsibilities, plaintiffs clearly fall within the class of employees to be excluded from overtime compensation."

There is no rational difference between the role of Postal Inspectors within the Postal Service and the role of BCI Investigators within the State Police. Each of these positions could be analyzed to be law enforcement "production workers" under DOL's current interpretation, yet DOL and these appellate courts concluded that Postal Inspectors are exempt under the administrative

[16]Before the Second Circuit, DOL attempted to explain the decision in *Sprague* by characterizing this statement as dicta. This is plainly incorrect. The statement is in fact the holding of the court in *Sprague.*

exemption. Clearly, under the analysis of the Second Circuit, Postal Inspectors do not "administer the affairs" of the Post Office. They "produce" criminal investigations of the postal laws, one of the "businesses" of the Postal Service.

Although the Court of Appeals did not address the inconsistent results between its decision and the decisions of the courts in *Sprague* and *Dymond* in any respect whatsoever, the results clearly are in direct conflict, and thus warrant review of the decision of the Second Circuit.

Congressional intent is clear that criminal investigators are exempt from the overtime requirement of the FLSA.

While the State believes that the inconsistent treatment by DOL of federal and state employees and the failure of the courts below even to address this inconsistency in any way is sufficient to warrant review by this Court, a further basis for review is the inconsistency of the result below with clear indications that Congress intends criminal investigators and persons performing similar law enforcement functions to be exempt from the overtime requirements of the FLSA.

Pursuant to federal law governing pay of federal employees, 5 U.S.C. §§ 5541 *et seq.*, certain federal employees receive "Premium Pay."[17] Title 5 U.S.C. § 5545(c) covers the payment of "irregular" or "administratively uncontrollable overtime" (AUO) overtime, which is intended for positions "in which the hours of duty cannot be controlled administratively, and which require[ ] substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty. . . ." It is expressly stated in the legislative history of this law that premium pay was directed primarily at the irregular overtime worked by criminal investigators, *see* 1954 *U.S. Code Cong. & Ad. News*, pp. 3823-3824 (Senate Report, Post Office and Civil Service Committee), pp. 3833-3834 (Conference Report), and p. 3870 (Comments of Civil Service Commission), and, in fact, federal

[17]After passage of the Federal Employee Pay Comparability Act of 1990 (FEPCA), discussed further below, the premium pay provisions of Title 5 no longer are applicable to those employees subject to the overtime provisions of the FLSA.

criminal investigators receive AUO. For example, all FBI Special Agents receive AUO.[18]

In 1989, Congress significantly amended the AUO law to raise the amount of AUO to be paid certain upper grade employees. *See* Pub. L. 101-173, 103 Stat. 1292. In so doing, Congress recognized not only that "[f]ederal law enforcement officers are the most frequent recipients of AUO," *but that such officers do not receive overtime at time and a half under the FLSA for these kinds of overtime hours. See* Serial No. 100-58, Report of Hearing Before the Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service of the House of Representatives on June 15, 1988, *passim* and particularly pp. 1, 3, 5, 8-15.[19] For example, Congresswoman Morella pointed out that "even with enactment of this bill, they still would be paid below what the Fair Labor Standards Act requires." *Id.* at 34. A letter from the Federal Wildlife Officers Association noted that the "Special Agents [working for U.S. Fish and Wildlife Service, Division of Law Enforcement] are exempt from the Fair Labor Standards Act. . . ." *Id.* at 44.

The House Report accompanying the bill amending this provision, HR 101-325, 1989 *U.S. Code Cong. & Ad. News,* p. 734 at 736, notes that

> the category of Federal employees most likely to perform AUO are criminal investigators "whose hours of duty are dictated by what criminals do and when they do it." . . . According to OPM regulations, the unusual duties

[18]A United States General Accounting Office Report to the Chairman, Committee on Post Office and Civil Service, House of Representatives on the Overtime Pay Practices of the Federal Bureau of Investigation, June, 1988, in the record below as defendants' exhibit "Q," states in relevant part:

> The FBI authorizes AUO for all Special Agents on the basis that their hours of duty are not subject to administrative control, and that agents must do substantial amounts of irregular or occasional overtime work to satisfactorily discharge their duties. Special Agents are responsible for determining, without supervisory approval, when to remain on duty or return to duty, as required by circumstances. . . .

[19]This document is in the record as defendants' exhibit "R."

> of Federal criminal investigators include: shadowing suspects; working incognito among those under suspicion [sic] searching for evidence; meeting informers; making arrests; and interviewing persons having knowledge of criminal activities. The duties described by OPM illustrate that the workload of criminal investigators is not as easily managed as with other occupations.

The OPM regulation on AUO, 5 C.F.R. § 550.153(a), further states that the hours and place of work of a criminal investigator depend on the behavior of the criminals or suspected criminals and cannot be controlled administratively. In such a situation, the hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty (which can be done when, for example, a type of work occurs primarily at certain times of day); or granting compensatory time off duty to offset overtime hours required.

The short discussion in the House and Senate on passage of this law also clearly reflects the recognition by Congress that federal criminal investigators do not receive FLSA overtime. Congresswoman Oakar stated:

> Mr. Speaker, I introduced this legislation again this year because I saw a tremendous inequity in the manner in which we pay individuals who are part of our Federal law enforcement offices in terms of their overtime. *As a matter of fact, we do not pay them for overtime, and we are talking about people who are in agencies like the FBI, the CIA, DEA, the Secret Services, the Park Police, and so on.* (Emphasis added).

Cong. Rec., H 8443, November 13, 1989. Congressman Gilman further stated, *id.:*

> Understandably, the hours the covered employees work are not dictated by a work schedule but by what suspects do and when they do it. Our salary structure should be flexible enough to assist this part of our work force and not to hinder them.

See also Cong. Rec. S 15476-15478, November 13, 1989.

In 1990, Congress passed the Federal Employees Pay Comparability Act of 1990 (FEPCA) as part of Pub. L. 101-509, reprinted in 1990 *U.S. Code Cong. and Ad. News,* 104 Stat. 1427 *et*

seq. Based on a report to Congress by the National Advisory Commission on Law Enforcement (the Commission) in April, 1990,[20] Title IV of FEPCA raised the pay of federal law enforcement officers in several ways.[21] The commission included several members of Congress, as well as officials from various federal agencies, including the FBI, DEA, OPM, Treasury, Interior, the Attorney General and officers from federal employee organizations, including the Federal Law Enforcement Officers Association.

While the Commission's report explicitly acknowledges that federal law enforcement personnel do not receive time and one half pay for overtime hours, the Commission did *not* recommend that federal investigators be paid FLSA overtime for all overtime. Rather, the Commission recommended, and Congress enacted, increases in investigators' pay in other respects.[22]

Congress thus has recently repeatedly recognized and acted on the fact that federal criminal investigators are exempt from FLSA overtime.[23] Nevertheless, neither the district court nor the Court of

[20]This is in the record as defendants' exhibit "P."

[21]Title IV, § 412, also required OPM not later than January 1, 1993, to forward to Congress "a plan" to establish a separate pay and classification system for federal law enforcement officers and specifications for legislation to implement such a plan. 104 Stat 1469. Submission of a plan has apparently been delayed.

[22]The report concluded that "non-uniformed officer work in the federal and state and local law enforcement organizations was generally comparable" (p. 49). Non-Uniformed officers include the detectives of state and local police, state investigative agencies, and the range of federal criminal investigator positions grouped under the current GS-1811 classification series. Also included are postal inspectors, diplomatic security agents, and detectives in the U.S. Park Police (p. 47).

[23]It is no response to the clear expression of congressional intent regarding the exempt status of criminal investigators to say that when Congress acted to supplement federal criminal investigators' salaries it was merely acting in the face of the practical reality that criminal investigators had been classified exempt by the various federal agencies and that this status had not yet been overruled or contradicted by the courts. It would be nonsensical for Congress, addressing what was characterized as a crisis in the payment of federal criminal investigators (Footnote continued on next page.)

Appeals addressed in any respect the evidence of congressional intent regarding the exempt status of criminal investigators.

The Court of Appeals failed to interpret the administrative exemption in a manner consistent with the State's sovereignty.

Review is also appropriate because of the concerns of state sovereignty underlying the issues of interpretation in this case. At issue here is not merely in what manner or how much criminal investigators are paid for overtime hours, but whether the State can deploy its criminal investigators in the manner deemed most effective and efficient to perform the State's sovereign function of fighting crime and keeping the peace.

The State of New York has determined that a strict time and one half overtime system severely hampers the freedom, discretion and judgment its criminal investigators need to solve the serious crimes committed within the State. The decision sought to be reviewed has a direct and deleterious effect on the ability of the people of the State to fight crime most effectively with the resources available. The decision effectively dictates that New York and other state and local governments are free to structure their criminal investigation services in one way only: the way Department of Labor bureaucrats dictate. The decision thus strikes directly at the core function of local government, one of the primary reasons for the organization of governments—the ability to keep the peace.

This Court has recognized the "preeminent role of the States in preventing and dealing with crime. . . ." *Martin v. Ohio*, 480 U.S. 228, 232 (1987). "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, . . . and that we should not lightly construe the

(Footnote continued.)
in two successive legislative sessions, to do indirectly what it had the power to do directly. That is, Congress could have acted to amend the law to assure that federal criminal investigators were paid at the FLSA time and one half rate for all overtime hours worked. Instead, in recognition of the long-established exempt status of criminal investigators and their need to work many self-determined and unscheduled hours of overtime in properly performing their jobs, Congress acted in other ways to increase the compensation of investigators.

Constitution as to intrude upon the administration of justice by the individual States." *Patterson v. New York,* 432 U.S. 197, 201 (1977); *See also Medina v. California,* ____ U.S. ____, 112 S. Ct. 2572, 2577, 120 L. Ed.3d 353, 363 (1992).

The local power of police enforcement of the laws is one of the most significant and long-standing exclusive powers of the sovereign States. Local decisions by the citizens of the States regarding criminal justice and deployment of police are at the core of a federalist system of government established under the Constitution. *See Bute v. Illinois,* 333 U.S. 640, 651-652 (1948). *See* also *Garcia,* 469 U.S. at 575 (Powell J., dissenting) ("Police protection" among those activities "that epitomize the concerns of local democratic self-government" and that "affect the everyday lives of citizens.")

As this Court held in *Gregory v. Ashcroft,* ____ U.S. ____, 111 S. Ct. 2395, 115 L. Ed.2d 410 (1991), and other cases, in interpreting statutes in areas affecting significant state sovereignty interests, unless a court is certain that the result sought by plaintiffs is consistent with congressional intent, the court should resolve any ambiguity in favor of the State's sovereignty. *Ashcroft,* ____ U.S. at ____, 111 S. Ct. at 2401, 115 L. Ed.2d at 424. This plain statement rule has often been applied in areas of state criminal jurisdiction. *See United States v. Bass,* 404 U.S. 336, 349 (1971) (Plain statement rule applied to reject statutory interpretation that would "effect a significant change in the sensitive relation between federal and state jurisdiction."); *Kelly v. Robinson,* 479 U.S. 36, 49 (1986) ("States' interest in administering their criminal justice systems free from federal interference is one of the most powerful" considerations in statutory interpretation of Bankruptcy Code.)[24] Applied in this case, the plain statement rule means that unless the intent not to exempt criminal investigators is "unmistakably clear," they should be exempt. *Ashcroft,* ____ U.S. at ____, 111 S. Ct. at 2401, 115 L. Ed.2d at 424.

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[24]In light of these principles of statutory interpretation respecting federalism and the sovereignty of the States, it is particularly significant to note that whether plaintiffs are exempt under the FLSA turns entirely on the interpretation of regulations drafted in the 1930s and 1940s—long before the FLSA was made applicable to the States.

Here, not only is Congress's intent to make criminal investigators subject to the time and one half overtime requirements not "unmistakably clear," but Congress has repeatedly recognized that a time and one half overtime system for criminal investigators is inefficient and unworkable and has clearly acknowledged criminal investigators' exempt status.

One of the purposes of the FLSA was to make the working of overtime hours economically inefficient so that more people would be hired to do the work. *See* Senate Report No. 1487, reprinted in 1966 *U.S. Code Cong. & Ad. News,* at p. 3024. Congress has recognized that this rationale does not apply to the work of investigation of serious crimes. Investigators are not like most other employees and they are not even like other police officers; they are not typically "scheduled" to work overtime by their employers. Overtime hours are simply inherent in the job.

In fact, if overtime at a time and one half rate is required to be paid, to control unpredictable and uncontrollable overtime investigative costs, the State would need to place limits on the number of hours worked. Such an artificial restraint places a major obstacle in the way of investigators in the performance of their jobs and reduces their effectiveness. Surely, Congress did not intend that the FLSA would be administered in a manner that *reduces* the ability of the State to fight serious crime.

Although this evidence of congressional intent was presented to the courts below, neither the district court nor the Court of Appeals addressed this evidence in any specific respect. While the Court of Appeals "recognize[d] that a straight overtime compensation system may affect the flexibility and effectiveness of the BCI" (A 17), the Court of Appeals nevertheless held that the plain statement rule did "not suggest a different conclusion in this case." The court held that

> a requirement that the State pay overtime to BCI Investigators is not so intrusive as to strike at " 'the heart of representative government.' " *Gregory,* 111 S. Ct. at 2401 (quoting *Sugarman v. Dougall,* 413 U.S. 634, 647 [1973]). And, even if it were, we note that Congress's intent to apply the FLSA to state law enforcement agencies such as the BCI is unmistakably clear. *See* 29 U.S.C. § 207(k) (referring

specifically to employees engaged in "law enforcement activities" for state and local governments).

The Court of Appeals' conclusions in this regard are contrary to the holdings of this Court. The plain statement rule is not reserved only for situations that are deemed to "strike at the heart of representative government." The Court of Appeals ignored this Court's precedents applying the plain statement rule in matters of federal interference in local law enforcement. The Court of Appeals' decision also fails to accord proper weight to the negative effect the overtime requirement has on the State's ability effectively to fight serious crime, and on the importance of this function to the ability of the state government to fulfill its purpose as a sovereign government.

The Court of Appeals' conclusion that Congress's intent to apply the FLSA to state law enforcement agencies is unmistakably clear focuses on the wrong question. The State does not dispute that Congress intended to apply the FLSA to "law enforcement agencies." The question presented in this case, however, is whether Congress intended that the administrative exemption be interpreted and applied in such a way as to exempt criminal investigators. The evidence is overwhelming that Congress intended that they be exempt.[25]

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[25]The Court of Appeals' reliance on 29 U.S.C. § 207(k) is misplaced. The court simply ignored the abundant indications, both before and after the passage of § 207, that Congress recognizes that criminal investigators must work many hours of administratively uncontrollable overtime and that they are exempt from FLSA overtime. Furthermore, DOL has promulgated a regulation, 29 C.F.R. § 553.216 (A61), that provides that nothing in either 29 U.S.C. § 207(k) or § 213(b)(20) forecloses the use of the exemption in [§ 213(a)(1)] for law enforcement employees who meet the duty, responsibility and salary tests contained in Part 541 of the regulations. In fact, the regulation specifically states, although with no elaboration, that "certain criminal investigative agents may qualify as 'administrative' employees under section 13(a)(1)" (A62). *See also Sprague v. United States*, 677 F.2d 865 (Ct. Cl. 1982) (Court assumed Postal Inspectors are law enforcement officers within the meaning of 29 U.S.C. § 207(k), but upheld determination by DOL that they are exempt under the administrative exemption.)

The Court of Appeals simply failed to address any of this evidence, and failed to follow the teaching of *Gregory v. Ashcroft.*[26]

The decision below raises serious and unresolved questions regarding the power of the federal government by regulation to impair the ability of the State to perform its core sovereign functions.

Finally, if the regulation defining the administrative exemption were otherwise viewed as valid as applied in this case and BCI Investigators are not exempt from overtime within the meaning of the regulation, defendants respectfully request this Court to review under the Tenth Amendment the issue of the constitutionality of the regulation as applied.

The Court of Appeals reached defendants' Tenth Amendment challenge, but rejected it. The court held that *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), controls, stating that "the Tenth Amendment is not implicated where, as here, the State 'has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless' " (A 18, quoting *South Carolina v. Baker,* 485 U.S. 505, 513 [1988]). It is submitted that this was error. The holding in *Garcia* does not control the facts of this case.

This Court in *Garcia,* while overruling *National League of Cities v. Usery,* 426 U.S. 833 (1976), held no more than that the FLSA as applied to the San Antonio Metropolitan Transit Authority (SAMTA) was not destructive of state sovereignty, 469 U.S. at 554: "*[W]e need go no further* than to state that we perceive nothing in

[26]In light of all the considerations set forth above, the deference given by the Court of Appeals to DOL'S interpretation of the administrative exemption was improper. The usual deference given to interpretations of federal administrative agencies is not warranted in this case. *See General Electric Co. v. Gilbert,* 429 U.S. 125, 141-145 (1977) (Administrative guidelines of EEOC not followed where they conflicted with earlier pronouncement of agency and with other indicia of congressional intent, and where they "contain[ed] no suggestion that some new source of legislative history had been discovered in intervening eight years.").

the overtime and minimum wage requirements of the FLSA, *as applied to SAMTA,* that is destructive of state sovereignty or violative of any constitutional provision" (emphasis added). The Court did *not* hold that the application of the FLSA overtime and minimum wage requirements was constitutional as applied to every state employee position.

While the majority view in *Garcia* induced vigorous and well-reasoned dissents, both the context and the express terms of the holding make it clear that even the majority was unwilling to permit unconstrained federal regulation of States through the Commerce Clause. The Court stated, 469 U.S. at 556:

> Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.
>
> These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. . . .

Garcia does not control the result in this case because defendants challenge the application and interpretation of a federal regulation, not the application of the FLSA generally by Congress to the States. Not only is the intrusion on state sovereignty in this case the result of an interpretation of regulations rather than clear action by Congress, but the regulations were drafted decades before the FLSA was even applicable to government employees. Without doubt, the drafter of the regulations and the interpretations did not even conceive that the regulation would someday be applied to government employees. In drafting these regulations in the 1930s and 1940s DOL took great

pains to hold hearings and solicit comments from the affected persons and industries and to issue reports seeking to explain and justify its regulations as they apply to private industry. No such similar actions have been taken by DOL with respect to the application of the FLSA to government employees.

The "internal safeguards of the political process" therefore have *not* "performed as intended" here because it is the DOL interpretation of a regulation rather than a clear congressional mandate that is intruding on the State's sovereignty. In fact, to the extent Congress has acted clearly in this case, it has indicated, as discussed above pp. 17-21, an intent precisely contrary to the result reached below.

In *Gregory v. Ashcroft*, ____ U.S. ____, 111 S. Ct. 2395, 115 L. Ed.2d 410 (1991), the Court stated that application of the "plain statement" rule, would avoid "a potential constitutional problem." ____ U.S. at ____, 111 S. Ct. at 2403, 115 L. Ed.2d at 426. If the regulation is interpreted as the Court of Appeals has done here, the potential constitutional problem cannot be avoided.

The effect of the application of the overtime requirement to BCI investigators is unlike any effect of such application to private parties. Plainly, BCI Investigators exercise powers of state sovereignty that few other government employees do. Most state employees do not have the power of arrest or the ability to execute warrants. The power of arrest includes the discretion to determine when there is probable cause to make an arrest. Further, while many other state employees can be said to perform functions that have counterparts in the private sector, BCI Investigators perform functions of state government that are uniquely governmental. Any interference with the exercise of these powers seriously affects the ability of the State to be a sovereign state.

As the Court of Appeals itself recognized (A 17), as a result of the court's decision, the quality of criminal investigation of serious crimes in New York will inevitably decline because the quality would depend to a large degree on the availability of funds to pay for investigation. The control of expenses under an overtime system, moreover, requires that the broad discretion of investigators to conduct investigations in the manner they see fit be compromised.

Supervisors need to watch the number of hours expended and compare it to available funds, and make determinations as to what overtime should be worked. Crimes that should be solved will not be solved.[27]

If a serious crime is committed in the State of New York, the citizens do not call federal investigators. They call local investigators, who in many communities are BCI Investigators. If the BCI, as a result of the requirements of the FLSA, is either no longer located in the community or cannot effectively respond because of fiscal constraints imposed by the FLSA requirements, the citizens of the States will hold local elected officials responsible, not federal officials. This completely destroys federalism. *See Bute*, 333 U.S. at 651-652, *Ashcroft*, ____ U.S. at ____, 111 S. Ct. 2395, 115 L. Ed.2d 410 (1991); *New York v. United States*, ____ U.S. ____, 112 S. Ct. 2408, 2424, 120 L. Ed.2d 120, 146 ("Accountability is thus diminished when, due to federal coercion, elected officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation.")[28]

Application of the regulation to require payment of overtime to BCI Investigators thus severely restricts the power of the State to be responsive to the needs of its citizens and "upset[s] the usual constitutional balance of federal and state powers." *Ashcroft*, ____ U.S. at ____, 111 S. Ct. at 2401, 115 L. Ed.2d 423. It deprives the citizens of the State of New York of all the advantages of a federalist

[27]DOL has interpreted the FLSA to require an employer to pay overtime for all hours an employee "is suffered or permitted to work whether or not he is required to do so." 29 C.F.R. § 778.223. In other words, an employer must make an employee stop working or be liable for overtime. In this context, Investigators would actually need to be ordered to stop investigating. The nature of investigation is such, however, that supervisors cannot possibly know all the competing facts in making such determinations. Indeed, often supervisors are nowhere near Investigators while they are working. Other times, it is not possible for Investigators merely to cease what they are doing without severely compromising the investigation or their own safety.

[28]While some problems may be national in scope and require a national solution imposed by the federal government, how local criminal investigative services are structured is not such a problem.

system listed by the Court in *Ashcroft*, ____ U.S. at ____, 111 S. Ct. at 2399, 115 L. Ed.2d at 432. In concrete, practical consequences the decision of the Court of Appeals means that the State cannot structure the provision of the most basic and core governmental service—preservation of law and order—in a way the citizens of the State and their elected representatives think best. The interpretation of the regulation adopted by the Court of Appeals also completely stifles innovation and experimentation in the provision by the government of these types of services since the State, constrained by bureaucratic dictates not remotely sensitive to local needs of the citizens of the State, would be free to structure its criminal investigation services in only one way: the way the Department of Labor commands.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Dated: Albany, New York
November , 1993

Respectfully submitted,

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Of Counsel

APPENDIX A—Opinion of the Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1585, 1586 August Term, 1992

(Argued: June 2, 1993 Decided: Aug. 23, 1993)

Docket Nos. 93-6005, 93-7027

ROBERT B. REICH, Secretary of the United States Department of Labor,

Plaintiff-Appellee,

v.

STATE OF NEW YORK,

Defendant-Appellant.

GERALD J. LONG; PAUL L. PIWINSKI; DENIS J. DONOVAN; ROBERT P. FAYNOR; JOHN J. TONZI; DONALD E. BRANDSTETTER; DOUGLAS C. FIELD, indi-

vidually and on behalf of others similarly situated; JOHN F. AHERN; WILLIAM M. AMBLER; DANIEL J. ARCURI; NORMAN ASHBARRY; NILES J. BALCH; JACK R. BAUM; ROBERT L. BOEK; ROBERT T. BRAMHALL, SR.; CHARLES T. BROWN; MICHAEL D. BYRNE; JOEL H. CAMPBELL; THOMAS P. CANASTAR; NICHOLAS A. CERRO; DENIS J. CIMBAL; GARY J. CORBETT; ALBERT CUKIERSKI; GARY J. DARSTEIN; DEAN C. DECKER; ORLANDO M. D'ELLA; DOMINICK DEPAOLA, JR.; ROBERT S. DIBBLE; DENNIS P. DOUGHERTY; DANIEL D. EVANS; KEITH R. FAIRCHILD; RUSSELL C. FRANCIS; EMANUEL S. FRIEDMAN; ROBERT M. FRITZEN; DOMINICK A. FROIO, JR.; DONALD C. GEARY; JOHN W. GRAHAM; DOUGLAS E. HERRMANN; STANLEY A. JUNG; EVELYN R. KENDRICK; ROBERT J. KILLOUGH; PASCUALE D. LAGATTA; WILLIAM L. LEFORT; JAMES E. MATHEWS; NORMAN J. MATTICE; JOHN R. MORLOCK; LAWRENCE J. MOYLAN; CHRISTOPHER M. MURPHY; RICHARD M. OWENS; DAVID NEIL PAUL; LELAND J. PAVLOT; ALLEN D. PIONTKOWSKI; MARIO J. RESTANTE; EUGENE L. RIFENBURG; JAMES L. ROGERS; RICHARD J. SAUER; THOMAS L. SEARS; WILLIAM D. SLAUGHTER; DOUGLAS B. SMITH; ROGER W. SYKES; SCOTT W. TODD; MATTHEW A. TYNAN; MICHAEL VISCO; CORNELIUS R. WALSH, JR.; ROBERT D. WARNER; DEXTER B. WASSALL; STANLEY E. WEIDMAN; GERALD J. WENDT; MILTON A. WHITE; MICHAEL J. YUZWAK; JOHN M. MORAN; CHRISTOPHER G. ALLEN; THOMAS E. ALSTON, III; CRAIG BALDWIN; RICHARD O. BATES; LYLE E. BAXTER; DONALD W. BERBERICH; ROBERT L.

BESWICK; HUGH L. BIGGER; SALLIE C. BLOOMER; JOSEPH E. BOCHNIK, ALAN T. BROCK; VINCENT T. BURKE; WILLIAM CABALLERO; DENNIS M. CALLAHAN; WILLIAM T. CAREY; LAWRENCE P. CHAMBERS; GARFIELD CLARK, JR.; JOHN M. CLEARY, JR.; EDWARD J. COLLINS; FRANK COSTA; PAUL T. DECILLIS; FRANK J. DEGENNARO; CHARLES J. DEPALMA; JOSEPH W. DECKER; DONALD P. DELANEY; JAMES DOCHERTY; ALBERT J. DRAKE; BRUCE C. DUNNING; JAMES P. ALOI; SENIOR B. AULD; JOSEPH J. BARRETT; LOUIS A. BATTISTELLO; CLAUS J. BEBENSEE; ROBERT J. BERRY; WAYNE E. BEYEA; DANIEL E. BISHOP; HAROLD T. BLOOMER, III; JUNE M. BRADLEY; HERMAN C. BROWN, JR.; THOMAS J. BUTLER; PATRICK J. CAFFERY; MARTIN A. CARD; KEVIN D. CAVANAGH; RODGER W. CHILLEMI; ROBERT F. CLEARY; NEIL A. COLELLO; ANTHONY COPPO; LENNIE DANIELS; EDWARD L. DEFISHER; SOLOMON DEJESUS; CHARLES J. DECHON; LOUIS R. DELTORO; JOHN J. DIPOFI; RANDOLPH B. DONALDSON; HENRY H. DUNN; JOHN P. DUNNING; ELKAN EASTMAN; STEVEN A. ERCOLE; PRESTON L. FELTON; STEWART F. FIELD, JR.; MARK FISCHER; GARY F. FORSHEE; JOHN E. FULLER; ALBERT G. GERHART; STANLEY R. GLOVER; ORLANDO V. GONZALEZ; HAROLD GRIFFITHS; PAUL R. HANS; GREGORY J. HARLIN; ROBERT A. HARTMANN; ROBERT B. HAYES; ROBERT HENDERSON; RUSSELL G. HICKS; WALTER T. HOLLOWAY; WAYNE HUGGLER; JORGE J. IBANEZ-DELGADO; SALVATORE INDELICATU; PAUL T. JOHNSON; KENNETH T. JONES; GEORGE A. JURAK; PAUL H. KELLY; PETER L. KIRK; THOMAS

G. KLEINHANS; ANTHONY S. KOLAKOSKI; GEORGE W. ELSTON; ROGER L. FAIRCHILD; DAVID R. FERRINGER; CARLOS E. FIGUEROA; MARY E. FITZPATRICK; CHARLES W. FOSTER; ROBERT E. FULLER; ROBERT F. GIERY; DAVID H. GOGGIN; GILBERT N. GREEN, JR.; JOHN J. GRIMMKE; JON B. HANSEN; EDWARD C. HARTMANN; PAUL J. HASSELMANN; STEPHAN A. HEGARTY; THOMAS K. HERRICK; JEROME HOLLAND; JOSEPH W. HOLLY; JOHANNES A. HURBANEK; JUAN C. INCLAN; HECTOR M. JIMENEZ; DOUGLAS W. JOHNSTONE; LAWRENCE JONIGAN; LEONARD C. KASSON; JOHN M. KENNEDY; ALLAN W. KIRKWOOD; MICHAEL A. KLUSACEK; CHARLES F. KORAN; ERIC W. KRUGER; DONNA L. LAMPERT; GEORGE W. LAWSON; ROBERT H. LEWIS; DOMINICK A. MAGRO; THOMAS D. MANAHER; WILLIAM J. MANTE; DONALD B. MARKERT; CHARLES A. MARTIN; EDWARD C. MARTINEZ; JOHN J. McCABE; TERRENCE P. McCORMICK; ROBERTO McFARLANE; THOMAS H. McHUGH; ROBERT F. McLEAN; THOMAS S. MEEHAN; THOMAS J. MILLER; EDWARD P. MOFFE; ROBERT L. MONROE; WILLIAM P. MORSHEIMER; GREGORY MOSLEY; MARTIN MULLIGAN; JAMES J. MURPHY, JR.; STEPHEN NEVINS; THADDEUS A. NIKSA; JOHN J. NOONAN; JOHN O'BRIEN; JOHN E. O'KEEFE; PAUL G. KUNAR; JOHN G. LANG; CHRISTOS G. LECAKES; STEVEN G. LOUDER; ISSAC A. MALLARD; MICHAEL T. MANNING; DAVID P. MARCHITELL; DENNIS D. MARSH; HAROLD A. MARTIN; ROBERT A. MAURIN; DONALD T. McCONVILLE; JOHN W. McCROARY; RICHARD L. McGEE; CHARLES J. McKENNA; CHARLES J.

McLOUGHLIN; JOSE A. MENDEZ; JOHN R. MITCHELL; BRUCE A. MONFORTE; GORDON T. MOSHER; TERRENCE F. MULLEN; ROBERT W. MURPHY; REGINALD A. NAU; JAMES J. NEWELL; DENNIS J. NOLAN; VINCENT S. NOTARO; WILLIAM L. O'BRIEN; TERRENCE P. O'MARA; JAMES P. O'NEILL; STEPHEN J. OATES; JOHN D. ODELL; JOHN A. OLQUIST; MICHAEL ORREGO; TED M. PALMER; STANLEY F. PAWELEK; ROBERT R. PHENES; ROBERT E. PINEAU; EDWARD RASO; GEORGE P. REBHAN; DANIEL J. REGINI; LOUIS E. RETZER; JOSE RIVERA; ROBERT W. ROCHLER; MICHAEL J. ROGAN; MARIO A. ROMAIN; STEVE M. SADOWSKI; PAUL M. SALVINO; BRUCE L. SCHOCKEN; GEORGE J. SCHWEIKART; RICHARD L. SHEARER; JOHN H. SHULTIS; ROGER D. SMITH; LUIS A. SOTO; JOHN P. SPENCER, JR.; THOMAS FRED STARACE; ROY L. STREEVER; THOMAS M. O'NEILL; RICHARD J. OCENASEK; ROBERT L. ODELL; RICHARD OLSEN; STEVEN ORTIZ; WILLIAM J. PALMER; EVERETT H. PEARSALL; KATHLEEN R. PIERINO; GEORGE C. PINTHER; GERALD L. RAUBER; MICHAEL S. REEVES; DANIEL J. REIDY; JAMES M. RIELLY; ROBERT S. ROBLES; LOUIS F. RODRIGUEZ; RICHARD B. ROGERS; VICTOR P. ROSATI; THOMAS F. SALMON; ERROL I. SASSO; ROBERT L. SCHRAFF; JAMES SERRANO; LAWRENCE A. SHEWARK, JR.; FREDERICK H. SLANOVEC; VINCENT J. SNYDER; DENNIS SPANITZ; WILLIAM G. SPRAGUE; JACK S. STENBERG; PAUL F. SWEETMAN; PATRICK D. SYLVESTRE; GERALD TIERNAN; LUIS E. TORRES; DEREK TUDOR; DALE A. VALENTINE; LUIS VELEZ; KEVIN W. WALSH; WILLIAM R. WHALEN;

THOMAS M. WOLF; HENRY G. YOUNGBLOOD; RICHARD D. THURSTON; JOSE L. TORRES; THOMAS C. TUCKER; MICHAEL R. URBANSKI; JOHN VANDERMOLEN, JR.; ROBERT T. VENEZIA; DONALD K. WENTWORTH, JR.; ARTHUR C. WILSON, III; CHARLES E. WOOD; THOMAS H. ZIMMER,

Plaintiffs-Appellees,

v.

THOMAS A. CONSTANTINE, as Superintendent of the Division of the New York State Police; DIVISION OF THE NEW YORK STATE POLICE; STATE OF NEW YORK,

Defendants-Appellants.

Before: MESKILL and McLAUGHLIN, *Circuit Judges,* and COVELLO, *District Judge.**

The State of New York appeals from two orders entered in the United States District Court for the Northern District of New York (Con. J. Cholakis, *J.*) enjoining it from claiming the administrative exemption to the Fair Labor Standards Act for Investigators of the New York State Police Bureau of Criminal Investigation.

Affirmed.

*The Honorable Alfred V. Covello, United States District Judge for the District of Connecticut, sitting by designation.

ALAN S. KAUFMAN, Albany, NY (Robert Abrams, Att'y Gen. State of NY, Peter H. Schiff Deputy Solicitor Gen., Albany, NY, of counsel), *for Defendants-Appellants State of New York; Thomas A. Constantine; and Division of the New York State Police.*

PAUL L. FRIEDEN, Washington, DC (Judith E. Kramer, Monica Gallagher, William J. Stone, U.S. Dep't of Labor, William Kanter, Bruce G. Forrest, Civil Division, U.S. Dep't of Justice, of counsel), *for Plaintiff-Appellee Secretary of Labor.*

GREGORY K. McGILLIVARY, Washington, DC (Thomas A. Woodley, Mulholland & Hickey, Washington, DC, Douglas L. Steele, Blitman & King, Syracuse, NY, Jan M. Smolak, Michaels & Bell, Auburn, NY, of counsel), *for Plaintiffs-Appellees Gerald J. Long et al.*

Stuart E. Schiffer, Acting Ass't Att'y Gen., Gary L. Sharpe, U.S. Att'y, William Kanter, Bruce G. Forrest, Appellate Staff, Civil Division, Dep't of Justice, submitted a brief on behalf of the United States, as intervenor.

MCLAUGHLIN, *Circuit Judge:*

The State of New York appeals from two orders entered in the United States District Court for the Northern District of New York (Con. J. Cholakis, *J.*) in procedurally separate—but substantively similar—actions brought under the Fair Labor Standards Act ("FLSA"). The pivotal issue in both cases is whether Investigators of the New York State Police Bureau of Criminal Investigation ("BCI") fall within the administrative exemption to the FLSA. 29 U.S.C. § 213(a).

In separate actions, the Secretary of Labor and individual BCI Investigators sued the State of New York under the FLSA, challenging the State's failure to comply with the

overtime and recordkeeping provisions of the Act. The State countered that it was under no obligation to pay the FLSA overtime rate to Investigators because they fall within an exemption to the Act for administrative employees. Alternatively, the State protested that the Tenth Amendment barred application of the Act to the BCI, and the Eleventh Amendment barred the relief sought by the private plaintiffs. Rejecting the State's statutory and constitutional arguments, the district court granted summary judgment to the plaintiffs, denied the State's cross-motion for summary judgment, *see Ahern v. New York,* 807 F. Supp. 919 (N.D.N.Y. 1992), and entered an order in each action enjoining the State from claiming the administrative exemption as to the Investigators. The State now appeals; and we affirm.

BACKGROUND

The New York State Police is a division of the State's Executive Department; and provisions governing the State Police are set forth in Article 11 of New York's Executive Law. Executive Law §§ 31(4), 210-29 (McKinney 1993). Section 216 of that Article provides that members of the State Police may be assigned to a bureau of criminal investigation for the purpose of "preventing, investigating and detecting violations of the criminal laws of the state, and conducting such other investigations as may be provided for by law." Executive Law § 216(1) (McKinney's 1993). In order of seniority, BCI members are classified as: (1) Captains; (2) Lieutenants; (3) Senior Investigators; and (4) Investigators. *Id.*

There are about 4,000 sworn members of the State Police, and roughly 900 are plainclothes Senior Investigators or Investigators. The remaining 3,100 members constitute the "front line" uniform force of the State Police, 2,400 of

whom are classified as State Troopers. The Troopers are the visible, day-to-day presence of the State Police: they drive marked State Police cars and, on a typical day, respond to automobile accidents, conduct road checks, and issue speeding tickets. Troopers also conduct investigations of minor offenses, and conduct preliminary investigations of the more serious crimes. At the scene of a more serious crime, however, a Trooper is required to call in a BCI Investigator. Although Investigators hold the lowest rank within the BCI, they rank superior to Troopers because their BCI rank is comparable to that of a sergeant in the State Police.

Besides supervising Troopers' investigations, BCI Investigators also investigate felonies and major misdemeanors involving organized crime, firearms, narcotics and sex abuse. In that role, BCI Investigators investigate crime scenes, gather evidence, interview witnesses, interrogate and fingerprint suspects, make arrests, conduct surveillance, obtain search warrants, and testify in court. The plaintiffs and the State agree that the "primary duty" of BCI Investigators is the investigation and prevention of serious crimes.

BCI Investigators enjoy broad discretion in the conduct of their investigations, including the decision whether to make an arrest. No doubt, the unpredictable nature of criminal investigations necessitates flexibility in the hours worked by the Investigators. Likewise, the unfortunate abundance and complexity of serious crime in the State occasionally compels a workweek for Investigators in excess of the typical 40 hours. Investigators, however, are not paid overtime at the rate of one and one-half times their regular rate of pay, as is generally required for non-exempt employees

covered by the FLSA.[1] 29 U.S.C. § 207(a). In lieu of overtime pay, Investigators receive a premium in addition to their salary.

In 1989, three groups representing several hundred BCI Senior Investigators and Investigators sued the State, the State Police and its Superintendent, alleging that the State was in violation of the overtime and recordkeeping provisions of the FLSA. These three actions were consolidated in the district court. The Secretary of Labor also brought suit against the State; but the district court denied the State's motion to consolidate that case with the private plaintiffs' case. By informal agreement among counsel, both the Secretary's action and the private plaintiffs' action were litigated on the same schedule.

The Secretary's action differed in only minor respects from that of the private plaintiffs. The Secretary's complaint sought to enjoin the State from withholding back wages from the Senior Investigators and Investigators and from violating the overtime and recordkeeping provisions of the Act. The private plaintiffs' complaint alleged willful violations of the FLSA and, in addition to the relief sought by the secretary, sought an award of damages.

In its answer to both complaints, the State contended that: (1) the Investigators were exempt "administrative" employees under the Act; and, (2) the Senior Investigators were exempt under both the "administrative" and "executive" exemptions. 29 U.S.C. § 213(a)(1). The State further defended on constitutional grounds, arguing that: (1) the Tenth Amendment barred the application of the federal overtime provisions to the BCI; and, (2) the Eleventh Amendment barred the award of back pay in the private plaintiffs' action. Both sides moved for partial summary

[1]In limited instances, Investigators are paid time-and-one-half pay for certain scheduled overtime. This is pursuant to their collective bargaining agreement with the State.

judgment on the exemption issue as to both the Investigators and the Senior Investigators. The State's motion also raised its constitutional defenses.

To determine whether the Investigators and Senior Investigators qualified as exempt administrators or executives under the Act, the district court applied the Secretary of Labor's interpretations of those exemptions found in the regulations promulgated under the Act. *See* 29 C.F.R. § 541 *et seq.* (1993). Those regulations mandate a fact-intensive inquiry into the "primary duties" of the employees at issue. *See, e.g.*, 29 C.F.R. § 541.2(a). Applying these standards to the Senior Investigators, the court found the record "sufficiently muddled to preclude summary judgment" regarding their primary duties. 807 F. Supp. at 926. Accordingly, the exempt status of the Senior Investigators is not before us.

The court found no such factual quagmire, however, regarding the Investigators: their primary duty, the court concluded, was "the prevention, investigation, and detection of crime." 807 F. Supp. at 926. Since no fact issues remained, the court applied the tests set forth in the regulations to the duties of the Investigators to determine whether the administrative exemption applied. It concluded that the State failed to demonstrate that the Investigators were the "administrators" of the BCI. Hence, the FLSA mandated compliance with the overtime provisions of the Act, unless the Constitution stood in the way.

Reaching the constitutional issues, the court found that: (1) the Tenth Amendment was no bar to the application of the FLSA to the BCI; and, (2) the Eleventh Amendment was no impediment to an award of back pay from the State. Accordingly, the court granted plaintiffs' motions for summary judgment and denied defendants' cross-motion.

The State now appeals, renewing the arguments it made to the district court.

DISCUSSION

I. *The Administrative Exemption*

The State, of course, bears the burden of proving that the duties of the BCI Investigators place them within the administrative exemption. *See Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 614 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 298 (1992). And, consistent with the remedial purposes of the FLSA, we do not give FLSA exemptions generous application. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Malcolm Pirnie*, 949 F.2d at 614.

The State does not claim that there are issues of fact precluding summary judgment regarding the primary duties of the Investigators. Rather, it challenges only the court's ultimate conclusion that BCI Investigators are not exempt administrators. We review the correctness of that legal determination *de novo*. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986); *Malcolm Pirnie*, 949 F.2d at 614.

Section 7(a)(1) of the FLSA generally requires employers to pay employees at least one and one-half times their regular rate of pay for hours worked beyond 40 per week. 29 U.S.C. § 207(a)(1). Section 13(a)(1) of the Act, however, exempts from this time-and-a-half requirement workers "employed in a bona fide executive, administrative, or professional capacity," as those terms are "defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. § 213(a)(1). Because the statute delegates to the Secretary the authority to define the "administrative" exemption, the Secretary's definition, if reasonable, must be accepted by this Court and given the "force and effect of law." *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). *See also Chevron U.S.A., Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837, 844 (1984) ("[L]egislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

Pursuant to this grant of power, the Secretary established both a long test and a short test to determine whether an employee qualifies as an "administrative" employee. 29 C.F.R. §541.2 *et seq.* Which test to apply depends upon whether the employee is paid a salary of at least $250.00 per week; if so, we apply the short test. 29 C.F.R. § 541.2(e)(2). All parties agree that the short test applies to the Investigators.

Under the short test, an "administrative" employee is one whose "primary duty" consists of "office or nonmanual work" that: (1) is "directly related to management policies or general business operations" of the employer; and (2) requires "the exercise of discretion and independent judgment[.])" 29 C.F.R. §§ 541.2 (a) (1) & (e) (2).

To aid our application of this test, the Secretary has also promulgated interpretive regulations. In contrast to the controlling authority given the Secretary's *legislative* rules—i.e., those promulgated pursuant to an express grant of congressional authority—the respect accorded the Secretary's *interpretive* regulations depends upon their persuasiveness; and we will accept that interpretation to the extent it assists in applying the statute and the legislative rules. *See Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). *See also Batterton*, 432 U.S. at 425 n.9; *General Elec. Co. v. Gilbert*, 429 U.S..125, 140-42 (1976).

According to the Secretary's interpretative regulations, whether Investigators perform work "directly related to management policies or general business operations" of the BCI turns, in large part, on whether the Investigators perform the "administrative" activities of the BCI, as distin-

guished from its "production" activities. *See* 29 C.F.R. § 541.205(a). The district court relied upon this production/administrative dichotomy when it ruled that the Investigators were not exempt administrators. We agree.

Without question, the BCI is in the law enforcement "business." *See, e.g.*, Executive Law § 223 (duty of the state police is "to prevent and detect crime and apprehend criminals"); Executive Law § 216 (purpose of the BCI is "preventing, investigating and detecting violations of the criminal laws of the state"). And, it remains undisputed that the primary function of the Investigators within that business is to conduct—or "produce"—its criminal investigations. Investigators do not administer the affairs of that bureau; and the State does not argue that they do. We agree with the district court that the primary activities of the BCI Investigators place them squarely on the "production" side of the line. Accordingly, the Investigators do not fall within the administrative exemption to the FLSA; and the State must comply with the overtime provisions of the Act.

The State argues, however, that the district court gave undue weight to the Secretary's interpretative regulations. Specifically, the State maintains that the production/administrative dichotomy is outdated, unsound and unworkable. Essentially, the State's position is that interpretative rules conceived for the manufacturing industry of the 1940s are of no value when classifying employees in state government in the 1990s. On this point, the State emphasizes that state governments were not even subject to the FLSA when these interpretations were drafted. We think the State's argument reflects a misunderstanding of the role these interpretive regulations play in the determination of liability.

True, the Secretary's interpretations of the regulations are not entitled to the controlling significance of the legislative regulations themselves. But they are entitled to considerable

weight because they constitute a "body of experience and informed judgment to which courts. . . may properly resort for guidance." *Skidmore*, 323 U.S. at 140. *See also Board of Educ. v. Harris*, 622 F.2d 599, 613 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981). The measure of deference to which they are entitled depends upon their persuasiveness. *See Skidmore*, 323 U.S. at 140 (weight depends on "all those factors which give it power to persuade, if lacking power to control"). Rejecting an argument comparable to that pressed by the State here, the Fifth Circuit explained:

> To the extent that a district court finds in the interpretations an analogy useful in deciding the case before it, it may rely on the interpretations as persuasive evidence of both Congress's legislative and the Secretary's regulatory intent. At the same time, should a district court find the concepts expressed inapposite to the facts before it, the court is free to engage in its own application of the (exemption) and the pertinent regulations.

Dalheim v. KDFW-TV, 918 F.2d 1220, 1228 (5th Cir. 1990) (rejecting employer's argument that Secretary's interpretative regulations reflected "'erroneous, outmoded assumptions'" about the TV industry).

In this case, the district court found the production worker analogy useful in determining the exempt status of the Investigators. And we agree with its ultimate determination. Hence, even if we were persuaded that the dichotomy lacked persuasive value in this case, we would nevertheless affirm the judgment of the district court. *See Dalheim*, 918 F.2d at 1228 ("whether a district court finds [the interpretive regulations] persuasive is not controlling: if the court's application of the statute and substantive regulations are

legally correct and its factfinding is without clear error, there is no basis for reversal on appeal").

We are not persuaded, moreover, that these interpretive regulations lack persuasive authority. First, we disagree with the State that the production/administrative dichotomy has limited usefulness outside the manufacturing context. To the contrary, the analogy has repeatedly proven useful to courts in a variety of non-manufacturing settings. *See e.g., Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 903 (3d Cir. 1991) (applying analysis to salespersons: "The concept is not limited to manufacturing activities."), *cert. denied*, 112 S. Ct. 1473 (1992); *Dalheim*, 918 F.2d at 1230 (applying analysis to TV producers: "Section 541.205(a) is not concerned with distinguishing between white collar and blue collar employees, or between service industries and manufacturing industries."); *Gusdonovich v. Business Information Co.*, 705 F. Supp. 262 (W.D. Pa. 1985) (applying analysis to insurance claims investigator). Furthermore, courts have demonstrated little difficulty applying the "production worker" analogy to employees in the public sector. *See, e.g., Roney v. United States*, 790 F. Supp. 23 (D.D.C. 1992) (applying analysis to deputy U.S. marshals); *Harris v. District of Columbia*, 741 F. Supp. 254 (D.D.C. 1990) (applying analysis to housing inspectors). While we might agree that "analogies between business and government often are somewhat strained, the general principles and rationales underlying the regulations are instructive in a government context." *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990) (applying analysis to probation officers), *cert. denied*, 498 U.S. 1086 (1991). Accordingly, the district court did not err when it relied upon these interpretive regulations to arrive at its conclusion.

The State next argues, in the alternative, that even if the production/administrative dichotomy is a valid interpreta-

tion of the administrative exemption and the legislative regulations, the district court erred when it found the Investigators to be the production workers of the BCI. On this point, the State emphasizes the broad discretion enjoyed by the Investigators in the conduct of investigations. If any members of the State Police should be classified as its "production workers," the State believes, it is the Troopers. We find these arguments unpersuasive, as they do not address themselves to the relevant inquiry: i.e., the relationship of the Investigators to the management policies or general business operations of the BCI and the State Police.

Finally, the State contends that the Investigators should not be entitled to time-and-a-half because overtime work is "inherent" in the nature of their work. The State labors to convince us that forcing it to pay the Investigators FLSA overtime rates will impede the State's ability to fight crime. While we recognize that a straight overtime compensation system may affect the flexibility and effectiveness of the BCI, it is not our province to decide what constitutes sound policy for the State Police. Our function is limited to deciding the narrow question of whether the function of the BCI investigators places them within the scope of the administrative exemption to the FLSA. The State, of course, remains free to invoke the political processes to convince Congress and the Secretary of the correctness of its views.

In sum, we conclude that the Investigators are not exempt from the coverage of the FLSA.

II. *The Constitutional Arguments*

A. *The Tenth Amendment*

Despite the Supreme Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528

(1985), the State's first constitutional argument is that the Tenth Amendment precludes application of the FLSA to the BCI. In a challenge to the application of the FLSA to a state agency, *Garcia* held that the Tenth Amendment contains no substantive limitation on the power of Congress to regulate commerce. *Id.* at 552. *See also South Carolina v. Baker,* 485 U.S. 505, 512 (1988). Rather, after *Garcia* the "States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *Baker,* 485 U.S. at 512. In short, the Tenth Amendment is not implicated where, as here, the State "has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Baker,* 485 U.S. at 513.

The State maintains, however, that *Garcia* is not the last word on the Tenth Amendment, and that the Court's subsequent decision in *Gregory v. Ashcroft,* 111 S. Ct. 2395 (1991), compels a contrary conclusion. We do not agree. Nothing in *Gregory* resurrects the substantive Tenth Amendment limitations interred by *Garcia.* Rather, *Gregory* merely counsels that, out of respect for state sovereignty, we should not interpret a federal statute in such a way as "would upset the usual constitutional balance of federal and state power," at least absent a clear statement of intent to do so in the statute itself. 111 S. Ct. at 2401. *Gregory's* plain statement rule does not suggest a different conclusion in this case.

Here, a requirement that the State pay overtime to BCI Investigators is not so intrusive as to strike at " 'the heart of representative government.' " *Gregory,* 111 S. Ct. at 2401 (quoting *Sugarman v. Dougall,* 413 U.S. 634, 647 (1973)). And, even if it were, we note that Congress's intent to apply the FLSA to state law enforcement agencies such as the BCI

is unmistakably clear. *See* 29 U.S.C. § 207(k) (referring specifically to employees engaged in "law enforcement activities" for state and local governments). Accordingly, *Gregory* is inapposite.

B. *The Eleventh Amendment*

We also reject the State's Eleventh Amendment argument. The Eleventh Amendment safeguards the sovereign immunity of the states by limiting the power of Article III courts over actions brought against a state. Absent a waiver of that immunity by the state, or an abrogation of that immunity by Congress, a federal court may not entertain a citizen's suit against a state. *See Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304-06 (1990). The test for determining whether Congress abrogated state sovereign immunity is a demanding one: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). *See also Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("[E]vidence of congressional intent must be both unequivocal and textual."). The district court held that in the FLSA Congress abrogated the State's immunity. We agree.

The State asks us to hold, as the Supreme Court did in *Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279 (1973), that Congress's intent to abrogate sovereign immunity is not sufficiently clear in the FLSA. In

that case, the Court focused on section 16(b) of the statute,[2] and observed:

> It would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the old 16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away. It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.

Id. at 285. Since *Employees*, however, Congress has not remained silent.

In 1974, Congress amended the very statute found deficient in *Employees* to include "public agenc[ies]" within the scope of employers subject to suit under the Act.[3] The Act defined "public agency" to include "the government of a State or political subdivision thereof." 29 U.S.C. § 203(x). Hence, it is clear that Congress amended section 16(b) with the intent that states and their political subdivisions would thereafter be subject to suit in federal court for violations of

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[2]In 1973, section 16(b) of the Act read, in relevant part:

> Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b) (1970).

[3]The 1974 amendment to section 16(b) replaced the language "maintained in any court" with "maintained against any employer (*including a public agency*) in any *Federal* or State court." 29 U.S.C. § 216(b) (Supp. 1976) (emphasis added).

the FLSA. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 8-11 (1989) (amendments to CERCLA designed to bring states and their subdivisions within the reach of the Act was sufficient to abrogate sovereign immunity). Further, in 1985 Congress again amended the Act, in part to alleviate the financial burdens that would befall states and their political subdivisions in the wake of *Garcia*. *See* Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (1985). *See generally* S. Rep. No. 159, 99th Cong., 1st Sess. 2 (1985), *reprinted in*, 1985 U.S.C.C.A.N. 651, 655 ("it is essential that the particular needs and circumstances of the States and their political subdivisions be carefully weighed and fairly accommodated" in light of *Garcia*). Accordingly, we find that Congress has made its intent to abrogate the states' sovereign immunity abundantly clear in the language of the FLSA, as amended in 1974 and 1985. *Accord Hale v. Arizona*, 993 F.2d 1387, 1391-92 (9th Cir. 1993) (*en banc*); *Spencer v. Auditor of Public Accounts*, 705 F. Supp. 340, 343 (E.D. Ky. 1989); *contra American Federation of State, County & Municipal Employees, etc. v. Corrections Dep't of New Mexico*, 783 F. Supp. 1320, 1323 (D. N.M. 1992) (Congress's intent to abrogate immunity under FLSA not sufficiently clear). The State's Eleventh Amendment challenge, therefore, must fail.

CONCLUSION

We have considered the State's remaining arguments and find them to be without merit. Accordingly, the judgment of the district court is affirmed.

APPENDIX B—Opinion and Orders of the District Court for the Northern District of New York.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

JOHN F. AHERN, *et al*,

Plaintiffs,

against

THE STATE OF NEW YORK, THE DIVISION OF THE NEW YORK STATE POLICE, and THOMAS A. CONSTANTINE, as Superintendent of the Division of the New York State Police,

Defendants.

89-CV-956

GERALD J. LONG, PAUL L. PIWINSKI, DENIS J. DONOVAN, ROBERT P. FAYNOR, JOHN J. TONZI, DONALD E. BRANDSTETTER, DOUGLAS C. FIELD, Individually and on behalf of others similarly situated,

Plaintiffs,

against

THOMAS CONSTANTINE, Superintendent New York State Police, NEW YORK STATE POLICE and THE STATE OF NEW YORK,

Defendants.

89-CV-887

JOHN M. MORAN, *et al*,

Plaintiffs,

against

STATE OF NEW YORK,

Defendant.

89-CV-1235

LYNN MARTIN, Secretary of Labor UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

89-CV-1110

Appearances:

Blitman & King, Esqs., Attorneys for Plaintiffs—89-CV-956, 500 South Salina Street—Suite 1100, Syracuse, New York 13202, Of counsel: Douglas L. Steele, Esq.

Michaels & Bell, P.C., Attorneys for Plaintiffs—89-CV-887, P.O. Box 308, Auburn, New York 13021, Of counsel: Jan M. Smolak, Esq.

Mulholland & Hickey, Esqs., Attorneys for Plaintiffs—89-CV-1235, 1125 15th Street NW, Suite 400, Washington, D.C. 20005, Of counsel: Gregory K. McGuillivary.

Patricia M. Rodenhausen, Esq., Regional Solicitor, Attorney for Plaintiff—89-CV-1110, U.S. Department of Labor, 201 Varick Street Room 707, New York, New York 10014, Of counsel: James A. Magenheimer, Esq.

Robert Abrams, Attorney General, State of New York, Attorney for Defendants, Department of Law, The Capitol, Albany, New York 12224, Of counsel: Alan S. Kaufman, Esq. Assistant Attorney General.

CON. G. CHOLAKIS, D.J.

MEMORANDUM

For the convenience of the Court and the parties, this Memorandum addresses the issues in the above-captioned matters. At issue in each case is whether the members of the New York State Police Bureau of Criminal Investigation (BCI) fall within the "administrative or executive employee" exception to the federal Fair Labor Standards Act of 1938 (FLSA) , codified as amended at 29 U.S.C. § 201 *et seq*. Individual members of the BCI (the private plaintiffs) commenced several civil actions against defendant Thomas Constantine in his capacity as Superintendent of the New York State Police, and against the State Police and the State of New York, alleging that the State's failure to pay them

overtime violates the FLSA. In addition, the Secretary of Labor has filed suit against the State under the FLSA with respect to the identical practices of the State Police. The private plaintiffs have consolidated their respective motion papers.[1]

Several dichotomies characterize these cases. First, there are two relevant exemptions from the duty to pay overtime that the State claims apply to the cases: the administrative exemption, found at 29 C.F.R. § 541.2, and the executive exemption, found at 29 C.F.R. § 541.1.[2] Second, there are two classes of BCI police officers: "Investigators" and "Senior Investigators." The third dichotomy involves a distinction between the "production" work of the employer (in this case, the State Police) and its "administrative operations." See 29 C.F.R. § 541.205 (a) (Secretary's interpretation of administrative exemption). The Department of Labor uses the production/administration dichotomy to identify which employees fall within the administrative exemption to the FLSA, and which may claim overtime pay.

After extensive discovery, the private plaintiffs and the Secretary of Labor moved for partial summary judgment ultimately to determine whether the State has violated the overtime pay provisions of the FLSA, and more specifically, to determine whether the State may claim the admin-

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[1]The individual plaintiffs in *Long et al. v. Constantine et al.*, No. 89-CV-887, *Ahern et al. v. New York*, No. 89-CV-956, and *Moran et al. v. New York*, No. 89-CV-1235 are jointly pursuing the motion for summary judgment. Similarly, defendants are consolidating their response to these motions for summary judgment with their response to the Secretary of Labor's motion for summary judgment in *Martin v. New York*, No. 89-CV-1110.

[2]Congress delegated the task of developing the FLSA exemptions to the Secretary of Labor. Courts have upheld this delegation of authority. *See, e.g., Fanelli v. United States Gypsum Co.*, 141 F.2d 216, 218 (2d Cir. 1944).

istrative and executive exemptions.[3] Conversely, the State has made a cross-motion for summary judgment, seeking a ruling that the plaintiff BCI members are exempt from overtime provisions of the FLSA, or that applying the Act to the State Police would offend the State's sovereignty, as guaranteed under the Tenth and Eleventh Amendments to the United States Constitution.

Summary Judgment Standards

When considering a motion for summary judgment, the Court first aims to determine whether any genuine issues of material fact remain such as would justify a trial on the merits. The Court does not resolve factual disputes, but rather identifies them. If the Court concludes that no triable issues of fact remain, the Court will proceed to resolve the controversy by applying the law to the undisputed facts. *See* FED.R.CIV.P. 56.

The materiality of a fact depends upon the applicable law. In order to assess the materiality of the facts in this case, the Court must look to the regulations defining the administrative and executive exemptions because Congress has delegated the task of defining and delimiting these exemptions to the Secretary of Labor. 29 U.S.C. § 213(a)(1). Despite the State's voluminous submissions regarding federal compliance with the FLSA, the Court notes that the issue in the

[3]From the outset, the State has claimed that its Investigators and Senior Investigators fall within the administrative exemption, as defined in 29 C.F.R. § 541.2. More recently, the State has claimed that some of its Senior Investigators also fall within the executive exemption, as defined in 29 C.F.R. § 541.1. The Secretary of Labor moves for summary judgment only on the availability of the administrative exemption for the Investigators; as to the Senior Investigators and the administrative or executive exemptions, the Secretary claims that genuine issues of material fact remain. See Secretary's Response in Opposition to Defendant's Cross-Motion for Summary Judgment at 1-2.

present case is the applicability of the exemptions to the Investigators and Senior Investigators of the BCI.[4]

The parties' respective burdens also inform the Court's inquiry on a motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Under the applicable law, the State—as the party claiming the exemption from the FLSA—bears the burden of proving its entitlement to the exemption. *Martin v. Malcolm Pirnie, Inc.* 949 F.2d 611, 615 (2d Cir. 1991). Employees are presumptively entitled to overtime compensation for the hours they work in excess of the statutory maximum. Accordingly, if the State cannot show facts that would justify its claim of an exemption, summary judgment in favor of the plaintiffs would be appropriate. *Celotex*, 477 U.S. at 323-24 ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . .").

Because the State has raised several constitutional objections, it might make sense to address them before engaging in the summary judgment inquiry. A bona fide constitutional impediment to the application of the FLSA would render any factual dispute immaterial. Nevertheless, in light of the longstanding principle that courts must strive to avoid reaching constitutional issues if possible, the Court will first address the plaintiffs' statutory claims before considering, if necessary, the State's Tenth and Eleventh Amendment defenses.

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[4]The State's generous compilation of information about the labor practices of various federal agencies, including the Department of Labor, serves only to confuse the issues. At most, the State shows that a variety of federal agencies fail to comply with the FLSA. This potential federal non-compliance will not excuse violations of the FLSA elsewhere.

Statutory and Regulatory Provisions

At the outset, an evaluation of the applicable law will enable the Court to assess which facts are material, and of those, which are in dispute.

All plaintiffs in this case rely on 29 U.S.C. § 207, which provides for pay at one and one-half times the employee's regular pay rate for each hour that an employee works in excess of the statutory 40 hour workweek.[5] Similarly, the State relies on the exemptions from the overtime provision that Congress authorized the Secretary to "define and delimit" by regulation. *See* 29 U.S.C. § 213(a)(1).[6] These regulations appear at 29 C.F.R. §§ 541.1 and 541.2.

The State claims that all of its Investigators and Senior Investigators are exempt from the overtime provisions under the administrative exemption and that some of the Senior Investigators fall within the executive exemptions from the FLSA.[7]

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[5]Section 207(a) provides the general rule that,

[N]o employer shall employ any of his employees who in any workweek is engaged in commerce . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
29 U.S.C. § 207(a).

[6]Section 213(a)(1) provides in relevant part:

The provisions of [29 U.S.C. §§ 206 & 207] shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedures Act . . .)

[7]The Senior Investigators for whom the State claims the executive exemption are those who "manage a recognized department or unit and supervise two or more employees." *See* Defendants' Memorandum of Law at 131 n.47.

Executive Exemption

The Secretary has defined the executive exemption as follows:

> The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
>
> (b) Who customarily or regularly directs the work, of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent . . . of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section; and

> (f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week . . . *Provided,* That an employee who is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

29 C.F.R. § 541.1. Because the regulation is written in the conjunctive, an employer must establish that an employee meets each of the requirements before the employer is entitled to claim the exemption. However, because the BCI Investigators and Senior Investigators earned more than $250 each week during the relevant period, the "short test" found at 29 C.F.R. 541.1(f) applies. *See* Exhibits in Support of Plaintiffs' Motion for Partial Summary Judgment at Exh. 22-23 (compensation tables in collective bargaining agreement) . In light of special constraints that attend government employers,[8] the Secretary of Labor does not contest that the BCI members are "salaried" and therefore that the State must meet only the short test. For purposes of this motion, the Court will assume that the short test applies to the

[8]Many governmental employers must, under local statute, deduct amounts from their employees' pay under certain circumstances (e.g. unexcused leave). These deductions, by making it appear that the otherwise-salaried employee receives an hourly wage, might preclude the employee from passing the salary test of 29 C.F.R. § 541.118, and thereby prevent the government employer from claiming the administrative or executive exemption. Responding to this fact, the Secretary of

(Footnote continued on next page.)

determination of both the executive and administrative exemptions.

Thus, under the regulations, the job-related activities of the employees—their primary duties—become material facts. The applicability of the executive exemption depends upon whether the "primary duty" of the Senior Investigators consists of management, rather than investigations. The question of the primary duties of the Senior Investigators is, of course, a question of historical fact.

The Secretary argues that a genuine factual dispute remains because the sworn statements of several BCI Senior Investigators indicate that they spend the majority of their time investigating crimes, as opposed to managing other crime investigators. *See* Exhibits to Plaintiff's Statement in Response to Defendant's Rule 10(J) Statement of Facts (Secretary's response to Defendant's cross-motion). These statements of the Senior Investigators contradict the State's assertion that "the primary duty of a Senior Investigator is supervision and management of the particular unit assigned." Defendants' 10J Statement at ¶ 126. The Superintendent of the State Police affirms that "the primary duty of a Senior Investigator is supervision and management of the particular unit assigned." Affidavit of Thomas A. Constantine at ¶¶ 58-66. Undoubtedly, there is a factual dispute about the primary duties of the Senior Investigators.

(Footnote continued.)
Labor issued regulations in August of this year relaxing the salary test for government employees under some circumstances. *See* Plaintiff's Response in Opposition to Defendant's Cross-Motion for Summary Judgment at 10 n. 4; *see also* Exemptions from the Minimum Wage and Overtime Requirements of the Fair Labor Standards Act; Public Sector Employers, 57 Fed. Reg. 37,666 (1992) (to be codified at 29 C.F.R. § 541.5(d)).

The same factual dispute pervades the private plaintiffs' case with respect to the activities of the Senior Investigators. For example, the private plaintiffs rely on the Deposition of Captain Thomas Fazio for the assertion that Senior Investigators assigned to the Drug Enforcement Task Force spend a majority of their time doing "hands on work," as opposed to managing other Investigators. *See* Fazio Deposition at 25. But Captain Fazio's statements concerning the allocation of the Senior Investigators' activities between investigations and management were indefinite. In response to a question asking him how much time the Senior Investigators spend doing hands-on work, he said only "I would say a major part, but I couldn't give you a percentage . . . I'd say the major is more than half. I couldn't give an estimate on it." The statements of Superintendent Constantine, concerning the responsibilities and activities of the Senior Investigators, conflict with the plaintiffs' assertions that Senior Investigators primarily perform hands-on work, as opposed to administrative or supervisory work.

Moreover, some of the submissions that the parties rely on combine data for both Investigators and Senior Investigators. For example, the State Police apparently conducted a time management study which required members of the BCI to fill out a card everyday, indicating the time they expended, in each of several categories of activities. The resulting data, however, clumps the responses of the Senior Investigators together with those of the Investigators. This study, therefore, offers no insight into the primary duties of either class of Investigator.

In sum, genuine issues of material fact remain with respect to the activities of the Senior Investigators. Summary judgment, therefore, is not warranted on the issue of the applicability of the executive exemption to the Senior Investigators.

Administrative Exemption

The State also claims that both its Investigators and Senior Investigators fall within the exemption for administrative employees. The Secretary has defined and delimited the administrative exemption by issuing the following regulation:

> The term "employee employed in a bona fide administrative capacity" in section 13 (a) (1) of the Act shall mean any employee:
>
> (a) Whose primary duty consists of . . .
> (1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer' s customers . . . and
>
> (b) Who customarily and regularly exercises discretion and independent judgment; and
>
> (c)(1) Who regularly and directly assists . . . an employee employed in a bona fide executive or administrative capacity, or
>
> (2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or
>
> (3) Who executes under only general supervision special assignments and tasks; and
>
> (d) Who does not devote more than 20 percent . . . of his hours worked in a workweek to activities

> which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and
>
> (e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week . . .
>
> (2) . . . Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week . . . and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

29 C.F.R. § 541.2. As with the executive exemption, this regulation provides a "short test" that applies to this case, given the weekly salary of the BCI Investigators and Senior Investigators. 29 C.F.R. § 541.2(e)(2).

Under the "short test, the State must prove that the employees for whom it claims the administrative exemption primarily perform "office or nonmanual work directly related to management policies or general business operations" of the BCI, and in so doing, exercise discretion and independent judgment.

To aid in the interpretation of these regulations, the Secretary has drawn a distinction between "production" work and "administrative activities." *See* 29 C.F.R. § 541.205(a). Though the Secretary's interpretative regulations are not binding on the Court, they do provide "a body of experience and informed judgment to which courts and litigants

may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The administrative activities of an enterprise include, for example, advising management, planning, negotiating, representing the company, purchasing, and business research and control. 29 C.F.R. § 541.205(b). The regulation describes administrative work as that performed by "so-called white-collar employees engaged in 'servicing' a business . . ." *Id.* Production work, in contrast, is that work which constitutes the primary mission of the enterprise.

The State objects to this production/administration dichotomy, claiming that the distinction is outdated, conceived when manufacturing industries dominated our economy. Further, the State complains that the distinction fails to take into account the structure and function of a modern police organization. In contrast, the Secretary and several federal courts have found the dichotomy useful in the law enforcement context. For example, the Wage-Hour Administrator at the Department of Labor issued a formal opinion letter in which he opined that a police officer performing duties substantially similar to those of the BCI Investigators would be involved in "production work" and therefore not fall within the administrative exemption.[9]

Judge Louis Oberdorfer, of the United States District Court for the District of Columbia, similarly found that a United States Marshall whose job required him "to apply investigative knowledges [sic], skills, and abilities to con-

[9]The letter described the hypothetical police officer as having,

> "primary responsibility for all aspects of the investigation of major crimes, such as homicide, sexual assault, narcotics trafficking, and criminal intelligence gathering. The officer's duties would include, but would not be limited to, analyzing the crime, scene analysis, interviewing witnesses and victims, in

(Footnote continued on next page.)

duct investigations of substantial difficulty concerning violations of law . . ." fell outside the administrative exemption to the FLSA. *Roney v. United States,* Civil Action No. 90-2813, slip op. at 2 (D.D.C. Apr. 15, 1992). In so finding, Judge Oberdorfer considered the Secretary's distinction between production work and administrative work in the law enforcement context.

Similarly, three Circuit Courts of Appeals have found the production/administration dichotomy useful in non-manufacturing employment contexts. For example, the Circuit Courts have applied the interpretation to a television station, wholesale electric supply company, and a probation office. *See Martin v. Cooper Elec. Supply Co.,* 940 F.2d 896 (3d Cir. 1991), *cert. denied,* 117 L.Ed.2d 617 (1992) (wholesale electric supply); *Dalheim v. KDFW-TV,* 918 F.2d 1220 (5th Cir. 1990) (television station); *Bratt v. County of Los Angeles,* 912 F.2d 1066 (9th Cir. 1990), *cert. denied,* 112 L.Ed.2d 1049 (1991) (probation office).

Clearly, "the concept of 'production' in 29 C.F.R. § 541.205(a)'s administrative/productive work dichotomy is not to be understood as covering only work involving the manufacture of tangibles." *Cooper Elec.,* 940 F.2d at 903. Instead, the distinction that the Secretary's regulation draws is

> between those employees whose primary duty is administering the business affairs of the enterprise

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(Footnote continued.)

> terrogating suspects, analyzing the relative strength or weakness of a case, and determining whether to file criminal charges."

Opinion Letter of the Wage-Hour Administrator, No. 1583 (WH-529) (Feb. 1, 1988) (found in Addendum to Plaintiff's Partial Summary Judgment Memorandum at Tab 3).

> from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market.

Dalheim, 918 F.2d at 1230. In the case of the State Police, law enforcement is the service that the enterprise exists to produce.[10] *See* Affidavit of Thomas A. Constantine at ¶¶ 6, 18 (Superintendent's description of mission of State Police and BCI, respectively); N.Y. Exec. Law §§ 216, 223 (defining mission of State Police and BCI). There is no dispute about the mission of the State Police or the BCI.

The Court must evaluate the duties of the Senior Investigators and the Investigators to determine whether these employees have as their primary duty the production of law enforcement services or the administration of the BCI or its units.

As noted above, the facts pertaining to the primary duties of the Senior Investigators are sufficiently muddled to preclude summary judgment for any party.

The matter is different with respect to the Investigators. The State admits that the "the primary duty of Investigators is to prevent, investigate and detect serious violations of the criminal laws of the State of New York, mostly felonies, and conduct such other investigations as may be provided by law." *Compare* [Private] Plaintiff's 10J Statement at ¶ 34 *with* Defendants' 10J Statement in Response to Plaintiffs' 10J Statement at ¶ 34. Similarly, the State Police Administrative Manual, which defines the duties of Investigators, confirms that these employees have as their primary duties criminal investigation and law enforcement. *See* New York State Police Manual § 4.8 (found in Exhibits in Support of Plaintiffs' Motion for Partial Summary Judgment as Exh.

[10]Semantically, the formulation is awkward; conceptually, sound.

8). The State does not dispute that Investigators perform these tasks, but claims only that the list in § 4.8 is not exhaustive. In short, there is no genuine issue of material fact as to whether the Investigators have as their primary duty the prevention, investigation, and detection of crime. They perform the production work of the State Police; they do not administer the business affairs of that agency.

Applying the regulations and interpretations defining the administrative exemption to the undisputed facts, the Court finds that the BCI Investigators fall outside the administrative exemption. Save for any constitutional objection, partial summary judgment in favor of the plaintiffs is warranted.

Though the State does not dispute that some BCI Investigators worked more than 40 hours each workweek from May 22, 1987 to the present, the record does not adequately show which employees worked in excess of the statutory maximum without receiving "time and a half." *See* Secretary's 10J Statement at ¶ 9 and Defendant's Response to Secretary's 10J Statement at ¶ 9; Private Plaintiffs' 10J Statement at ¶ 64 and Defendants' Response to Private Plaintiffs' 10J Statements at ¶ 64. Of those employees who worked more than 40 hours in a workweek, the State admits that they did not receive compensation at a rate equal to one and one half times the normal rate of pay. *See* Secretary's 10J Statement at ¶ 10 and Defendants' Response at ¶ 10.

Though the record reveals that the State has violated 29 U.S.C. § 207 with respect to some of its BCI Investigators, the Court withholds judgment on the issue of the overtime violations until it can determine, with requisite particularity, the extent and specifics of these violations. The record is not yet ripe for this determination.

Constitutional Issues

Having concluded that, at least with respect to the BCI Investigators, the State may not avail itself of the administrative exemption, the Court cannot avoid the State's constitutional arguments under the Tenth and Eleventh Amendments.

1. *Tenth Amendment*

The Tenth Amendment does not bar Congress from imposing the FLSA upon the New York State Police. Despite some early and perhaps persistent confusion, the Supreme Court has held that the States must comply with the FLSA. *See Garcia v. San Antonio Metro. Transit Auth.* , 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery,* 426 U.S. 833 (1976)).[11]

Notwithstanding Justice Rehnquist's unusual prediction that the *Usery* holding will again capture enough votes on the Supreme Court, *Garcia,* 469 U.S. at 580 (Rehnquist dissenting), and notwithstanding the State's current head count of the Justices, *Garcia* remains the law of the land. *New York v. United States,* 120 L.Ed.2d 120, 140 (1992) (declining to revisit the holding in *Garcia*). Accordingly, there is no Tenth Amendment bar to applying the FLSA to the New York State Police.

2. *Eleventh Amendment*

Nor does the Eleventh Amendment shield the State Police from the burdens of the FLSA. The State asserts the Elev-

[11]In *Usery,* the Supreme Court held that subjecting the States to the FLSA offended the Tenth Amendment. Later, in *Garcia,* the high court renounced this view.

enth Amendment defense with respect to the claims of the private plaintiffs, arguing that Congress has not abrogated the State's immunity and the State has not waived it.

The State correctly points out that the Supreme Court, mindful of State sovereignty in our federal system, refuses to find an abrogation of sovereign immunity unless Congress expresses "its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 243 (1985); *Dellmuth v. Muth,* 491 U.S. 223, 230 (1989) (evidence of Congressional intent must be "unequivocal and textual"). The State claims that Congress has not spoken with sufficient precision to abrogate the State's protection against suit in a federal court. This argument lacks merit.

The FLSA expressly authorizes suit against any employer, including a "public agency," for violations of the minimum wage and maximum hour provisions of the statute. 29 U.S.C. §§ 216(b).[12] Congress has defined the term "public agency" to include state governments and agencies. *Id.* § 203 (x) . In addition, by providing specifically for the calculation of overtime pay for firefighters and law enforcement personnel, Congress clearly and textually manifested its intention that the FLSA applies to state agencies, like the New York State Police. *See, e.q.* 29 U.S.C. §§ 207(k), (o), & (p).

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[12]In relevant part, section 216(b) reads:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b).

Therefore, the Court finds that Congress has unequivocally abrogated the State's Eleventh Amendment immunity.[13]

Conclusion and Disposition

The Court has considered the other arguments that the parties raise and finds it unnecessary to address them. Having found that the FLSA applies to the State Police and that the State may not claim the administrative exemption with respect to its Investigators, and having rejected the State's constitutional arguments, the Court will grant the plaintiffs' motions for summary judgment with respect to the investigators, and deny the defendants' motions in their entirety. Appropriate orders are attached.

s/Con. G. Cholakis
CON. G. CHOLAKIS, JUDGE
UNITED STATES DISTRICT COURT

Dated: Albany, New York
December 8, 1992

[13]The State claims that the purported abrogation is ineffective because "mere inclusion of the states within statutory definitions has not been accepted by the Supreme Court as sufficient by itself." *See* Memorandum of Law in Opposition to Plaintiffs' Motions for Summary Judgment at 62-62. This argument, too, must fail. Here, the parenthetical reference to public agencies and the reinforcing definition found at 29 U.S.C. § 203(x) unequivocally abrogate the State's Eleventh Amendment immunity. *Cf. Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 8 (1989)(the statute's inclusion of States within the definition of "persons" and the plain statement that States are to be considered "owners or operators" together suffice to abrogate sovereign immunity under CERCLA).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

JOHN F. AHERN, *et al.*,

Plaintiffs,

against

THE STATE OF NEW YORK, THE DIVISION OF THE NEW YORK STATE POLICE, and THOMAS A. CONSTANTINE, as Superintendent of the Division of the New York State Police,

Defendants.

89-CV-956

GERALD J. LONG, PAUL L. PIWINSKI, DENIS J. DONOVAN, ROBERT P. FAYNOR, JOHN J. TONZI, DONALD E. BRANDSTETTER, DOUGLAS C. FIELD, Individually and on behalf of others similarly situated,

Plaintiffs,

against

THOMAS CONSTANTINE, Superintendent New York State Police, NEW YORK STATE POLICE and THE STATE OF NEW YORK,

Defendants.

89-CV-887

JOHN M. MORAN, *et al.*,

Plaintiffs,

against

STATE OF NEW YORK,

Defendant.

89-CV-1235

Appearances:

Blitman & King, Esqs., Attorneys for Plaintiffs—89-CV-956, 500 South Salina Street—Suite 1100, Syracuse, New York 13202, Of counsel: Douglas L. Steele, Esq.

Michaels & Bell, P.C., Attorneys for Plaintiffs—89-CV-887, P.O. Box 308, Auburn, New York 13021, Of counsel: Jan M. Smolak, Esq.

Mulholland & Hickey, Esqs., Attorneys for Plaintiffs—89-CV-1235, 1125 15th Street NW, Suite 400, Washington, D.C. 20005, Of counsel: Gregory K. McGuillivary.

Robert Abrams, Attorney General, State of New York, Attorney for Defendant, Department of Law, The Capitol, Albany, New York 12224, Of counsel: Alan S. Kaufman, Esq.

CON. G. CHOLAKIS, D.J.

Order

For the reasons stated in the accompanying Memorandum dated this day, it is ORDERED that,

(1) Defendants' Motions for Summary Judgment are DENIED;

(2) The Plaintiffs' Motions for Summary Judgment are GRANTED IN PART and DENIED IN PART;

(3) The defendants shall not claim the administrative or executive exemptions from the overtime provisions of the Fair Labor Standards Act of 1938 with respect to the current and former Investigators of the New York State Police Bureau of Criminal Investigation.

The parties are directed to prepare for trial on the following issues:

(1) The applicability of the administrative and executive exemptions, defined at 29 C.F.R. § 541, to each of the Senior Investigators of the New York State Police Bureau of Criminal Investigation for whom the State claims such exemptions; and

(2) The amount of overtime pay that each plaintiff is entitled to under the Fair Labor Standards Act of 1938.

IT IS SO ORDERED.

s/Con. G. Cholakis
CON. G. CHOLAKIS, JUDGE
UNITED STATES DISTRICT COURT

Dated: Albany, New York
December 8, 1992

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

LYNN MARTIN, Secretary of Labor, United States Department of Labor,

Plaintiff,

against

STATE OF NEW YORK,

Defendant.

89-CV-1110

Appearances:

Patricia M. Rodenhausen, Esq., Regional Solicitor, Attorney for Plaintiff, 201 Varick Street Room 707, New York, New York 10014, Of counsel: James A. Magenheimer, Esq.

Robert Abrams, Attorney General, State of New York, Attorney for Defendant, Department of Law, The Capitol, Albany, New York 12224, Of counsel: Alan S. Kaufman, Esq.

CON. G. CHOLAKIS, D.J.

Order

For the reasons stated in the accompanying Memorandum dated this day, it is ORDERED that,

(1) Defendant's Motion for Summary Judgment is DENIED;

(2) The Plaintiff's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART;

(3) The Defendant is enjoined from claiming the administrative and executive exemptions from the Fair Labor Standards Act of 1938, 29 U.S.C. § 213, with respect to the current and former Investigators of the New York State Police Bureau of Criminal Investigation.

The parties are directed to proceed to trial on the following issues:

(1) The applicability of the administrative and executive exemptions, defined at 29 C.F.R. § 541, to each of the Senior Investigators of the New York State Police Bureau of Criminal Investigation for whom the State claims such exemptions;

(2) The extent of the Defendant's liability for overtime for its Investigators and Senior Investigators (if any) under the Fair Labor Standards Act of 1938.

IT IS SO ORDERED.

s/Con. G. Cholakis
CON. G. CHOLAKIS, JUDGE
UNITED STATES DISTRICT COURT

Dated: Albany, New York
December 8, 1992

APPENDIX C—Constitutional, Statutory and Regulatory Provisions Involved.

United States Constitution, Amendment 10:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

29 U.S.C. § 207(a)(1):

Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(k):

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the

> aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 213(a)(1):

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to—

> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II

of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities);

39 U.S.C. § 404(a):

Without limitation of the generality of its powers, the Postal Service shall have the following specific powers, among others:

(1) to provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail, and for the disposition of undeliverable mail;

(2) to prescribe, in accordance with this title, the amount of postage and the manner in which it is to be paid;

(3) to determine the need for post offices, postal and training facilities and equipment, and to provide such offices, facilities, and equipment as it determines are needed;

(4) to provide and sell postage stamps and other stamped paper, cards, and envelopes and to provide

such other evidence of payment of postage and fees as may be necessary or desirable;

(5) to provide philatelic services;

(6) to provide, establish, change, or abolish special nonpostal or similar services;

(7) to investigate postal offenses and civil matters relating to the Postal Service;

(8) to offer and pay rewards for information and services in connection with violations of the postal laws, and, unless a different disposal is expressly prescribed, to pay one-half of all penalties and forfeitures imposed for violations of law affecting the Postal Service, its revenues, or property, to the person informing for the same, and to pay the other one-half into the Postal Service Fund; and

(9) to authorize the issuance of a substitute check for a lost, stolen, or destroyed check of the Postal Service.

39 U.S.C. § 3523(a) (superseded):

§ 3523. Positions in salary level 13

(a) Postal inspector. (KP-32)

(1) Basic function.—Is responsible in an assigned territory usually including all classes of post offices, for inspection and investigative programs covering all phases of the

postal service. In heavily populated areas may be assigned a majority of the time to selected types of work as determined by the inspector-in-charge.

(2) Duties and responsibilities—assigned territory.—

(A) Inspects post offices and related postal units to insure compliance with postal laws and regulations, protection and proper expenditure of postal revenues and appropriated funds, and evaluates and reports to administrative officials on operational efficiency.

(B) Maintains close working relationship with regional officials and submits to them factual information and recommendations on conditions and needs of the postal service; acts as counselor to postmasters and other postal officials and employees in explaining instructions, regulations, applicable laws and decisions.

(C) Investigates violations of postal laws, including , but not limited to, armed robbery, mailing of bombs, burglary, theft of mail, embezzlements, obscene literature and pictures, and mail fraud.

(D) Determines the validity and seriousness of charges against postmasters and other officers and employees and makes pertinent recommendations.

(E) Investigates local and area operating problems and recommends corrective action, and within his prescribed jurisdiction, initiates necessary corrective action, including restoration of service immediately in disaster areas caused by hurricanes, tornadoes, floods, and other catastrophes.

(F) Maintains liaison activities (i) with military installations to insure adequate postal service for the military forces; (ii) with Federal and State civil defense authorities at the area level; (iii) with branches of Federal and State law enforcement agencies.

(G) Ascertains postal needs for post offices and stations, rural and city delivery, changes in schedules, quarters, equipment, manpower and procedures and reports findings and recommendations to appropriate officials.

Selected cases.—

(H) Investigates the loss, theft, destruction, and damage to mail matter through technical analyses of complaints and other specialized procedures.

(I) Investigates money-order forgeries; investigates complaints of use of the mails to defraud and to operate lotteries.

(J) Investigates personal injuries, motor-vehicle and other accidents; develops evidence for defense of suits under the so-called Federal Tort Claims Act; recommends out-of-court settlements.

(K) In any criminal investigation, develops evidence, locates witnesses and suspects; apprehends and effects arrests of postal offenders, presents facts to United States attorney, and collaborates as required with Federal and State prosecutors in presentation before United States commissioner, grand jury, and trial court.

(L) Surveys postal service on an area basis to ascertain and recommend ways of improving service and effecting economies.

(M) Makes investigations of a variety of other matters and performs related duties as assigned.

(3) Organizational relationships.—Responsible to the inspector-in-charge or the assistant inspector-in-charge of the division. Supervises trainees and other inspectors as assigned.

* * *

29 CFR § 541.2 Administrative.

The term *employee employed in a bona fide* * * * *administrative* * * * *capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of either:

(1) The performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c)(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations of this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e)(1) Who is compensated for his services on a salary or fee basis at a rate of not less than $155 per week ($130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities, or

(2) Who, in the case of academic administrative personnel, is compensated for services as required by paragraph (e)(1) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which em-

ployed: *Provided*, That an employee who is compensated on a salary or fee basis at a rate of not less than $250 per week ($200 per week if employed by other than the Federal Government in Puerto Rico, the Virgin Island, or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the performance of work described in paragraph (a) of this section, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all the requirements of this section.

* * *

29 CFR § 541.205 Directly related to management policies or general business operations.

(a) The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers.

(b) The administrative operations of the business include the work performed by so-called white-collar employees engaged in "servicing" a business as, for, example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. An employee performing such work is

engaged in activities relating to the administrative operations of the business notwithstanding that he is employed as an administrative assistant to an executive in the production department of the business.

(c) As used to describe work of substantial importance to the management or operation of the business, the phrase "directly related to management policies or general business operations" is not limited to persons who participate in the formulation of management policies or in the operation of the business as a whole. Employees whose work is "directly related" to management policies or to general business operations include those work [sic] affects policy or whose responsibility it is to execute or carry it out. The phrase also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.

(1) It is not possible to lay down specific rules that will indicate the precise point at which work becomes of substantial importance to the management or operation of a business. It should be clear that the cashier of a bank performs work at a responsible level and may therefore be said to be performing work directly related to management policies or general business operations. On the other hand, the bank teller does not. Likewise it is clear that bookkeepers, secretaries, and clerks of various kinds hold the run-of-the-mine positions in any ordinary business and are not performing work directly related to management policies or general business operations. On the other hand, a tax consultant employed either by an individual company or by a

firm of consultants is ordinarily doing work of substantial importance to the management or operation of a business.

(2) An employee performing routine clerical duties obviously is not performing work of substantial importance to the management or operation of the business even though he may exercise some measure of discretion and judgment as to the manner in which he performs his clerical tasks. A messenger boy who is entrusted with carrying large sums of money or securities cannot be said to be doing work of importance to the business even though serious consequences may flow from his neglect. An employee operating very expensive equipment may cause serious loss to his employer by the improper performance of his duties. An inspector, such as, for example, an inspector for an insurance company, may cause loss to his employer by the failure to perform his job properly. But such employees, obviously, are not performing work of such substantial importance to the management or operation of the business that it can be said to be "directly related to management policies or general business operations" as that phrase is used in § 541.2.

(3) Some firms employ persons whom they describe as "statisticians." If all such a person does, in effect, is to tabulate data, he is clearly not exempt. However, if such an employee makes analyses of data and draws conclusions which are important to the determination of, or which, in fact, determine financial, merchandising, or other policy, clearly he is doing work directly related to management policies or general business operations. Similarly, a personnel employee may be a clerk at a hiring window of a plant, or he may be a man who determines or effects personnel policies affecting all the workers in the establishment. In the latter case, he is clearly doing work directly related to

management policies or general business operations. These examples illustrate the two extremes. In each case, between these extreme types there are many employees whose work may be of substantial importance to the management or operation of the business, depending upon the particular facts.

(4) Another example of an employee whose work may be important to the welfare of the business is a buyer of a particular article or equipment in an industrial plant or personnel commonly called assistant buyers in retail or service establishments. Where such work is of substantial importance to the management or operation of the business, even though it may be limited to purchasing for a particular department of the business, it is directly related to management policies or general business operations.

(5) The test of "directly related to management policies or general business operations" is also met by many persons employed as advisory specialists and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate analysts, tax experts, account executives of advertising agencies, customers' brokers in stock exchange firms, promotion men, and many others.

(6) It should be noted in this connection that an employer's volume of activities may make it necessary to employ a number of employees in some of these categories. The fact that there are a number of other employees of the same employer carrying out assignments of the same relative importance or performing identical work does not affect the determination of whether they meet this test so long as the work of each such employee is of substantial importance to the management or operation of the business.

(7) In the data processing field some firms employ persons described as systems analysts and computer programmers. If such employees are concerned with the planning, scheduling, and coordination of activities which are required to develop systems for processing data to obtain solutions to complex business, scientific, or engineering problems of his employer or his employer's customers, he is clearly doing work directly related to management policies or general business operations.

(d) Under § 541.2 the "management policies or general business operations" may be those of the employer or the employer's customers. For example, many bona fide administrative employees perform important functions as advisers and consultants but are employed by a concern engaged in furnishing such services for a fee. Typical instances are tax experts, labor relations consultants, financial consultants, systems analysts, or resident buyers. Such employees, if they meet the other requirements of § 541.2, qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer.

* * *

29 CFR § 553.216 Other exemptions.

Although the 1974 Amendments to the FLSA provided special exemptions for employees of public agencies engaged in fire protection and law enforcement activities, such workers may also be subject to other exemptions in the Act, and public agencies may claim such other applicable ex-

emptions in lieu of sections 13(b)(20) and 7(k). For example, section 13(a)(1) provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR part 541. The section 13(a)(1) exemption can be claimed for any fire protection or law enforcement employee who meets all of the tests specified in part 541 relating to duties, responsibilities, and salary. Thus, high ranking police officials who are engaged in law enforcement activities, may also, depending on the facts, qualify for the section 13(a)(1) exemption as "executive" employees. Similarly, certain criminal investigative agents may qualify as "administrative" employees under section 13(a)(1). However, the election to take the section 13(a)(1) exemption for an employee who qualifies for it will not result in excluding that employee from the count that must be made to determine the application of the section 13(b)(20) exemption to the agency's other employees.

* * *

39 CFR §224.3 (1992) Postal Inspection Service.

(a) The Postal Inspection Service is headed by the Chief Postal Inspector who also acts as:

(1) The Inspector General for the Postal Service,

(2) The investigating official under the Program Fraud and Civil Remedies Act, and

(3) The Security Officer and Defense Coordinator for the Postal Service.

(b) The Postal Inspection Service is responsible for:

(1) Protecting mail matter, postal facilities and other postal assets, employees, and people on postal premises.

(2) Enforcing laws related to the Postal Service, the mails, other postal offenses and other laws of the United States.

(3) Conducting investigations into violations of federal laws that the Attorney General determines have a detrimental effect upon the operations of the Postal Service.

(4) Carrying out investigations and presenting evidence to the Department of Justice, U.S. Attorneys, and state and local authorities, in investigations of a criminal or civil nature.

(5) Carrying out administrative and civil investigations and presenting findings and evidence to postal management and attorneys in connection with administrative and civil actions.

(6) Performing internal audits of postal financial and nonfinancial operations.

(7) Providing security and defense coordination for the Postal Service.

(8) Maintaining liaison with investigative and law enforcement agencies, and all levels of government on matters of mutual interest.

(c) The Postal Inspection Service is responsible for exercising the authority, and carrying out the duties, functions, and responsibilities assigned to the Office of the Inspector General by the Inspector General Act.

(d) When the Chief Inspector determines it is necessary for carrying out the duties of Inspector General of the Postal Service, the Chief Inspector my employ independent legal counsel.

* * *

39 CFR § 224.7 (1976) Inspection Service.

The Inspection Service is headed by the Chief Inspector, who reports directly to the Postmaster General. The Inspection Service is responsible for protection of the mails, enforcement of postal laws, plant and personnel security, postal inspection, and internal audits. The Inspection Service, in accordance with applicable policies, regulations, and procedures, carries out investigations and presents evidence to the Department of Justice and U.S. attorneys in investigations of a criminal nature. It also undertakes operating inspections and audits for the Postal Service. The Chief Inspector acts as security officer and defense coordinator for the Postal Establishment, maintaining liaison with other investigative and law enforcement agencies of the Government.

* * *

39 CFR § 232.5 (1976) Arrest and subpena powers of postal inspectors.

(a) *Authorization.* Postal Inspectors are authorized to perform the following functions in connection with any matter within their respective official duties as established by the Chief Postal Inspector.

(1) Serve warrants and subpenas issued under the authority of the United States;

(2) Make arrests without warrant for offenses against the United States committed in their presence; and

(3) Make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.

(b) *Limitations.* The powers granted by paragraph (a) of this section shall be exercised only in the enforcement of laws regarding property of the United States in the custody of the Postal Service, including property of the Postal Service, the use of the mails, and other postal offenses.

* * *

39 CFR § 233.1 (1991) Arrest and subpoena powers of postal inspectors.

(a) *Authorization.* Postal Inspectors are authorized to perform the following functions in connection with any matter within their respective official duties as established by the Chief Postal Inspector.

(1) Serve warrants and subpenas [sic] issued under the authority of the United States;

(2) Make arrests without warrant for offenses against the United States committed in their presence; and

(3) Make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.

(b) *Limitations.* The powers granted by paragraph (a) of this section shall be exercised only in the enforcement of laws regarding property of the United States in the custody of the Postal Service, including property of the Postal Service, the use of the mails, and other postal offenses.

(c) *Issuance.* The Chief Postal Inspector, in accordance with Party 273 of this title, may issue documentary subpoenas under the Program Fraud Civil Remedies Acts.

* * *

APPENDIX D—Department of Labor Letter Rulings.

Letter Ruling: October 8, 1974 (WH-292)

We regret the delay in replying to your letters of June 27, and July 3, 1974, concerning the exempt status under the Fair Labor Standards Act of various classes of employees of ____ County.

The descriptions of the educational requirements and the duties and responsibilities of Public Defender Investigators II, and III submitted with your letter of June 27, 1974, would meet the conditions for exemption as administrative employees under Regulations, Part 541.2, where such employees are paid in accordance with the salary tests specified in the Regulations (copy enclosed). While the salaries outlined in your letter meet the salary tests contained in the current regulations, your attention is directed to the enclosed excerpt from the Federal Register of August 16, 1974, which proposes an interim increase in the salary rates for administrative employees to $160 a week and to $300 a week for the special high salary provisions.

With regard to the Deputy Probation Officers II and III listed in your letter of July 3, 1974, you are advised that based on the job descriptions submitted, they would meet the conditions for exemption as an administrative employee under Regulations Part 541.2.

It should be pointed out, however, that it is questionable whether Estate Investigators and Public Defender Investigators I whose duties are closely supervised by a superior would meet the independent discretion and judgment test or would spend at least 80% of their time worked in duties at the level contemplated by the exemption.

/s/ Betty Southard Murphy
Administrator
Wage and Hour Division

* * *

Letter Ruling: February 1, 1988 (no number assigned)

This is in further response to your letter in which you requested our opinion as to whether the minimum wage and overtime pay exemption provided by section 13(a)(1) of the Fair Labor Standards Act (FLSA) for bona fide administrative employees is applicable to a hypothetical police officer of the City of ____. We regret the delay in responding to your inquiry.

You provided additional information in a telephone conversation with a member of my staff in which you indicated that this opinion is being requested to obtain guidance with respect to the application of this exemption to police officers of the City of ____. In addition, you want to know what significance would be placed on training in determining the applicability of this exemption.

The hypothetical police officer would have primary responsibility for all aspects of the investigation of major crimes, such as homicide, sexual assault, narcotics trafficking, and criminal intelligence gathering. This officer's duties would include, but would not be limited to, analyzing the crime, scene analysis, interviewing witnesses and victims, interrogating suspects, analyzing the relative strength or weakness of a case, and determining whether to file criminal charges. The officer would perform such duties with minimal supervision. The officer would have advanced to this position after serving as a uniformed police officer and lower ranking detective, and would have received spe-

cial training at every level of police service. The officer would be paid a salary of not less than $250 per week.

The FLSA is a Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the current minimum wage of $3.35 an hour for all hours worked and overtime pay of not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Section 13(a)(1) of FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, 29 CFR Part 541. An employee may qualify for exemption as a bona fide administrative employee if all of the pertinent tests relating to duties, responsibilities, and salary, as discussed in section 541.2, are met. Pursuant to section 541.2(e)(2), an employee who is paid on a salary or fee basis of at least $250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers, which includes work requiring the exercise of discretion and independent judgment.

In determining whether activities are "directly related to management policies or general business operations" of the employer, it is important to consider the nature of the "business" itself, or in this case, the function of the government agency in question. Inasmuch as a police department has as its primary function law enforcement, investigative activities performed by the hypothetical police officer would appear to be related more to the ongoing day-to-day "production" operations of the department than to management

policies or "general business operations." It is therefore our opinion on the basis of the information you provided that the hypothetical police officer cannot qualify as a bona fide administrative employee under section 541.2 of the regulations.

The training that a city requires in order to ensure that police officers are qualified for their positions, or more advanced positions, is not particularly significant in determining the applicability of the exemption for bona fide administrative employees. This exemption does not apply on the basis of the successful completion of training courses of relatively short duration, or to any occupational group in an all-inclusive manner. You may also wish to note that the exemption is applicable only to an employee employed in a bona fide administrative capacity and does not include employees training for employment in an administrative capacity who are not actually performing the duties of a bona fide administrative employee.

We trust that the above is responsive to your inquiry.

/s/ Paul V. Smith
Administrator

* * *

Supreme Court, U.S.
FILED
JAN 19 1994
OFFICE OF THE CLERK

No. 93-797

In The

Supreme Court of the United States

October Term, 1993

STATE OF NEW YORK,

Petitioner,

v.

ROBERT B. REICH, Secretary of the United States Department of Labor,

Respondent.

THOMAS A. CONSTANTINE, As Superintendent of the Division of the New York State Police; DIVISION OF THE NEW YORK STATE POLICE; STATE OF NEW YORK,

Petitioner,

v.

GERALD J. LONG, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF STATES OF CALIFORNIA, ALASKA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, RHODE ISLAND, SOUTH CAROLINA, UTAH, VIRGINIA AND WASHINGTON IN SUPPORT OF PETITION FOR CERTIORARI

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STATEMENT OF INTEREST OF AMICUS STATES

The states represented herein share more than an abstract interest in the issues presented by New York. They share grave budgetary concerns caused in no small part by increasingly heavy federal mandates. Many of them have incurred fiscal deficits in recent years, and face new ones in 1994. They are attempting to confront increasing demands on their police, judicial, prosecutorial and correctional facilities imposed by growing crime rates and a corresponding burden on criminal justice systems. And many of them are inhibited in responding to these demands by state constitutional limits on spending.

An increasing number of these legal, social and political problems are arising from the inevitable tensions caused by these competing demands. States must have the freedom to structure their governmental functions in order to meet these diverse challenges.

SUMMARY OF THE ARGUMENT

Rigid application of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. (FLSA), to states and their subdivisions is causing increasing problems in this period of budget crisis and recessionary pressures. Federal mandates are placing state governments in an increasingly impossible position by depriving them of the flexibility they need to cope with shortfall deficits, and to comply with constitutional spending limits.

The inevitable effect of unbending adherence to standards designed for the private sector is to require restructuring of state governmental programs, thus effectively commandeering their legislative processes. The Tenth Amendment prohibits such a practice.

INTRODUCTION

As this Court has observed, its jurisprudence in application of the Tenth Amendment to state governmental functions has "travelled an unsteady path." *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408, 2420 (1992). This case provides a much-needed opportunity to provide certainty and stability in a field which otherwise will be the subject of increasing litigation as the irresistible force of federal mandates meet the immutable limits of state resources and the constraints of state constitutions.

Giving meaning to the Tenth Amendment has been no easy task. As this Court has accurately observed, the federal government undertakes activities today "that would have been unimaginable to the Framers . . . " *New York v. U.S.*, 112 S.Ct. 2408, 2418 (1992). Yet the constitutional powers of Congress were phrased broadly enough to allow for such expansion. *Ibid.* The ability of Congress to legislate in areas traditionally regulated by the states is indeed ". . . an extraordinary power in a federalist system." *Gregory v. Ashcroft*, ___ U.S. ___, 111 S.Ct. 2395, 2400 (1991).

For many years, the states were assured by this Court of protection from undue interference with their "freedom to structure integral operations in areas of traditional governmental functions," *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). It was generally assumed that Congress lacked the power to "impair the States' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547, n. 7 (1975); e.g., *Coyle v. Oklahoma*, 221 U.S. 559 (1911). This sense of security came to an abrupt end nine years ago. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the court tilted the scales in favor of a construction of the Commerce Clause giving the federal government virtually plenary power over state governmental activities.

Since then, this Court has shown a willingness to consider some of the problems caused by *Garcia's* expansive reach and to revisit the founders' intent to create a "compound republic," in which "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist, No. 51, p. 323 (J. Madison), No. 45 pp. 292-293 (C. Rossiter Ed. 1961) (J. Madison), cited in *Gregory v. Ashcroft, supra*, 111 S.Ct. at 2399-2400.

In *New York v. Reich*, the Court is asked to revisit the applicability of federal wage and hour requirements to states – this time to their criminal investigators. But the issues arising from slavish application of the federal mandates to states' criminal justice functions go much further. They have extended to require overtime for state patrol

cadets for attending classes at their academy, and virtually prohibit suspensions of state-employed administrative personnel for less than one week. Necessarily implicated in this issue is the ability of a state to structure its policy of law enforcement, and to maintain law and order. Few functions are more "integral" to the traditional functions of a state. Cf. *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981).

ARGUMENT

I

THE EMERGENCE OF MULTIPLE TENTH AMENDMENT ISSUES MAKES RECONSIDERATION OF *GARCIA* IMPERATIVE

New York v. Reich is the forerunner, not the culmination, of serious constitutional questions en route to this Court for needed resolution. Numerous other states face similar problems as they attempt to allocate dwindling resources to ever-increasing needs. Close on the heels of *Reich* are issues involving whether states must pay their employees even when their constitutions prohibit payment in the absence of a validly-enacted state budget, *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), petition for cert. filed, No. 93-772, and whether states may pay by registered warrants when no funds have been appropriated. *Parr v. State of California*, U.S.D.C., E.D. Cal. No. CIV-S-92-GE (Sept. 29, 1993). And in *Shepherd v. State of California*, E.D. Cal. No. S-90-0221-LFK, the issue of overtime policy for rural firefighters is presently being

contested.[1] Federal mandates of this kind have run at last into the prohibition against forcing states to enact statutes. They violate the principles set forth so eloquently in the recent opinions of this Court.

II

THE TENTH AMENDMENT PROHIBITS CONGRESS FROM SUBSTITUTING ITS JUDGMENT FOR THAT OF STATES IN ADMINISTERING STATE CRIMINAL JUSTICE SYSTEMS

Few areas have been subject to as much consideration and reconsideration as has the applicability of the Fair Labor Standards Act to state governmental systems. Unfortunately, the interplay of congressional mandates under the Commerce Clause with state sovereignty has

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[1] In California alone a swarm of cases are awaiting disposition in the federal courts or have recently been settled in light of rulings that *Garcia* controls. They include: *California Correctional Peace Officer Assn. v. State,* CIV-S-91-476-LKK (state parole agents); *California Union of Safety Employees v. State,* CIV-S-90-0167-LKK; *California Dept. of Forestry Employees Assn. v. State,* CIV-S-90-0221-LKK (battalion chiefs and other supervisory fire positions); *California Assn. of Professional Scientists v. State,* CIV-S-91-479-LKK (scientists working for state agencies); *Lomath v. State,* CIV-S-92-1690 (correctional sergeants and lieutenants in State Department of Corrections and Youth Authority); *Rafferty v. State,* CIV-S-92-177-DFL; *Dowling v. State,* CIV-S-90-0866. In addition, the State faces a number of lawsuits filed by prison inmates claiming the minimum wage for work performed during incarceration. We are also informed that 25-30 local governments in California are embroiled in similar litigation.

been the subject of decisions ruled as much by philosophy as by facts and controlling principles. Cf. Rotunda & Novak, 1 *Treatise on Constitutional Law* § 4.10, n. 33, p. 419 (West Pub. Co. 1992). Yet underlying even the most negative of decisions is the understanding that Congress could, if uninhibited by the Tenth Amendment, engage in "the utter destruction of the state as a sovereign political entity." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968); see also, *Employees of Dept. of Public Health & Welfare v. Missouri*, 411 U.S. 279 (1973).

For ten years, applicability of federal statutory mandates to the states was tested by three factors: (1) whether the regulation was applied to "States as States," (2) whether it affected "matters that are indisputably attributes of state sovereignty," and (3) whether the impact of compliance would directly impair states' ability "to structure integral operations in areas of traditional functions," thus affecting "matters essential to states' separate and independent existence." *National League of Cities v. Usery*, 426 U.S. 8323 (1976); see *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264 (1981), at 286-287. Underlying this tripartite test was the possibility that even if those standards were met, the "nature of the federal interest advanced may be such that it justifies state submission." *Hodel, supra*, 452 U.S. at 288, n. 29; *New York v. U.S., supra*, 112 S.Ct. at 2429.

One scholar characterized the *Usery* analysis this way: if the federal mandate was: "You pay the piper, but we'll call the tunes," the Tenth Amendment was violated. Rotunda & Novak, *supra*, § 4.10, p. 437, n. 82.

This test was successfully applied in a number of instances. Although the states' power to set wages in order to carry out their governmental functions was generally assumed to be "an undoubted attribute of state sovereignty," *Usery, supra,* 426 U.S. at 845, by no means were all exercises of commerce power invalidated. Thus the Court held that the states' interests in maintaining a blanket policy of discharging fish and game employees at age 55 did not arise to "integral operations in areas of traditional governmental functions" so as to justify exemption from the Age Discrimination Act. *Equal Employment Opportunity Commission v. Wyoming,* 460 U.S. 226 (1983). Nor did the operation of a state-owned railway constitute such a traditional function so as to excuse it from the requirements of the Railway Labor Act. *United Transportation Union v. Long Island, R.R. Co.,* 455 U.S. 678 (1982). Emergency wage freezes, adopted to meet a threat to the national economy were upheld. *Fry v. United States,* 421 U.S. 542 (1975). And merely requiring states to *consider* preferred federal standards was permissible, so long as they were not required to *adopt* them. *FERC v. Mississippi,* 456 U.S. 742 (1982), reh. denied, 458 U.S. 1131 (1982). None of those cases involved regulations with the potential to "overwhelm state fiscal policy." *Maryland v. Wirtz,* 321 U.S. 183, 203 (1968) (Douglas, J., dissenting).

The decade of *Usery,* however, soon came to an end, overruled in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985). *Garcia* purports to characterize the rule in a different way: Congress may choose the tune *and* the states must pay the piper. Any disputes over this must be resolved in Congress, and not before the Court. The unworkability of this concept is apparent.

Even in *Maryland v. Wirtz*, this Court assumed that it had "ample power to prevent . . . the utter destruction of the State as a sovereign political entity." *Id.*, 392 U.S. at 196. *Garcia* makes no such promises.

The *Garcia* decision makes the assumption that state sovereign interests are protected because the decisions of Congress are "decisions of the States themselves," through their elected representatives. *National League of Cities v. Usery, supra*, 426 U.S. at 841-842, n. 12. This assumption is untenable, not only in light of this Court's analogy to its separation of powers decisions (in which acts are held unconstitutional notwithstanding the chief executive's approval), *New York v. U.S., supra*, 112 S.Ct. at 2431-2432, but also in the context of the Bill of Rights in general. Members of Congress are elected by the people, although they represent states. If the only protection of states is to come from their elected federal representatives, why not conclude that Congress is similarly the only forum for protection against uncompensated takings of property or unlawful searches? *State* government, not Congress, bears the responsibility to represent and be accountable to its citizens. *New York v. U.S., supra*, 112 S.Ct. at 2429.

III

APPLICATION OF THE REGULATIONS IN QUESTION WILL EFFECTIVELY COMMANDEER THE LEGISLATIVE PROCESSES OF THE STATES

Ostensibly, the Fair Labor Standards Act subjects states to "the same legislation applicable to private parties." *New York v. U.S., supra*, 112 S.Ct. at 2520. However

as applied, its mandates will force states to "enact and enforce a federal regulatory program." *Id.* at 2420, quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981). As this Court observed in *New York*, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. U.S., supra*, 112 S.Ct. at 2420. "[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

In *New York v. U.S.*, Congress presented the states with a constitutionally unacceptable choice: either regulate according to our instructions or accept title to radioactive waste. *Id.*, 112 S.Ct. at 2428. As in the case before us, the State "may not decline to administer the federal program." *Id.* 112 S.Ct. at 2429. Insofar as the requirements of the federal act at issue here displace states' flexibility in administering their criminal justice system, they impede the states' responsibility "to represent and be accountable to (their) citizens." *Ibid.*

Only three years ago, this Court noted that a serious issue would arise if the FLSA were construed to apply to state constitutional processes establishing the qualifications of their officers: "It is obviously essential to the independence of the States, and to their peace and tranquillity, that their power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States." *Gregory v. Ashcroft, supra*, 111 S.Ct. at 2400-2401, quoting *Taylor v. Beckham*, 178 U.S. 548, 570-571 (1900). Bearing that principle in

mind, the Court held that the clearest intent of Congress would be required before the Act would be construed to apply to state court judges.

It was far from the founders' intent that Congress would take it upon itself to require a reallocation of state resources amounting to forced reorganization. Cf. The Federalist No. 17 at 68 (Alexander Hamilton), stating that any attempt to regulate the local police "would be as troublesome as it is nugatory." *Gregory v. Ashcroft* expressly recognized the authority of the people of a state "to determine the qualifications of their most important government officials." *Id.*, 111 S.Ct. at 2402. While the equal application of uniform hours and wages under the Commerce Clause to janitors employed in the statehouse as well as to those in an office building down the street arguably might present a different situation, cf. *National League of Cities v. Usery, supra,* 426 U.S. at 880 (Justice Stevens, dissenting), such an issue could be resolved by balancing the federal interest in such regulations against the state program involved, *id.* at 856 (concurring opinion of Blackmun, J.), not by declining to consider the entire issue.

If the power of Congress under the Commerce Clause were, as *Garcia* suggests, limited primarily by the political process, *Gregory v. Ashcroft, supra,* 111 S.Ct. at 2403, there would be few limits on its ability to restructure state governments. What would prevent an amendment to the FLSA requiring that the pay of state administrators be scaled on the extent of their compliance with specified federal acts? Could the wages and hours of state law enforcement officers be determined by the amount of

time spent in investigating interstate crimes? Could Congress require states "to quadruple their police forces in order to prevent commerce-crippling riots?" *Maryland v. Wirtz, supra,* 392 U.S. at 204-205 (Douglas, J. dissenting). Could Congress require bonuses to state policemen for time spent in assisting in RICO prosecutions?

Moving beyond the FLSA context, what would prevent the Congress from requiring states to administer federal wetlands laws and compensate the individuals subject to regulatory takings? Cf. S. Prakash, "Field Office Federalism," 79 Virginia L. Rev. 1957 (1993). In short, as Justice Douglas put it, could Congress "totally draw up each State's budget to avoid 'disruptive effect(s) . . . on commercial intercourse'?" *Ibid.*, quoting *Atlanta Motel v. United States,* 379 U.S. 241, 257.

Although this Court has repeatedly disapproved efforts to commandeer the state legislative process, full application of the *Garcia* principle here can have no other effect. As one federal judge observed, legislatures could be forced to (1) increase taxes even where state constitutions prohibit it, (2) curtail the nature and extent of essential services, (3) reduce indispensable services in other governmental programs in order to meet the budgets for those activities forced on them by the United States, and refrain from entering new fields of governmental activity necessitated by changing social conditions. *Maryland v. Wirtz,* 269 F.Supp. 826, 853 (D. Md. 1967) (dissenting opinion), quoted in *Maryland v. Wirtz,* 392 U.S. at 202-203 (Douglas, J. dissenting). The role of the states as laboratories for social and economic experiment will be limited indeed under this heavy-handed

federal regime. Cf. *New York State Ice Co. v. Liebmann*, 285 U.S. 260, 311 (1931) (Brandeis, J., dissenting).

The present state of Tenth Amendment jurisprudence is particularly unsatisfying. Unlike other provisions of the Bill of Rights, the Tenth Amendment lingers over the federal system like the smile of the Cheshire cat in Alice in Wonderland. It receives lip service, but is largely unenforceable in the courts. While sovereign states have vague assurances of some unspecified limit on the powers of Congress over the states, *Garcia, supra*, 469 U.S. at 556, the post-*Garcia* decisions have set few guideposts. We know that Congress may not "commandeer state legislative processes." But may it, as a practical effect, compel the effects of those processes by commandeering the states' budget process and redirecting the allocation of scarce resources?

What is left of the Tenth Amendment, then, can be easily circumvented. We believe that *Coyle v. Oklahoma, supra*, remains in effect and thus state capitols may not be changed by congressional mandate. But could Congress, acting through fair labor standards legislation, influence their location by requiring different pay scales for state employees in one city as opposed to another?

It has been suggested that the rule of construction set forth in *Gregory v. Ashcroft*, in its recognition of the importance of federalism, contravenes *Garcia v. San Antonio Metropolitan Transit Authority, supra*, and *South Carolina v. Baker*, 108 S.Ct. 2837 (1988), by treating states differently from private entities. *Gregory v. Ashcroft, supra*, 111 S.Ct. at 2410 (dissenting opinion of Justice White). But that is precisely what the Tenth Amendment was written

to do. If Congress were to have complete authority over states under the Commerce Clause, James Madison would have been guilty of election fraud in referring to the "compound republic of America," in which "the power surrendered by the people is . . . divided between two distinct governments." The Federalist No. 51, p. 323, quoted in *Gregory v. Ashcroft, supra,* 111 S.Ct. at 2400.

A provision that so drastically mandates a reallocation of state criminal enforcement resources amounts to coercion, not encouragement. It amounts to commandeering the legislative processes of States by compelling drastic reallocation of resources and restructuring of police functions. Cf. *New York v. U.S.,* 112 S.Ct. 2408 (1992). It permits the federal government to do indirectly what this Court has prohibited it from doing directly.

The time has come to reexamine the underlying rationale of *Garcia's* revisionist Tenth Amendment rule. It is more constitutionally significant that a federal act impairs the functioning of states as states, than whether the legislation is equally applicable to private parties. Cf. *National League of Cities v. Usery, supra,* with *New York v. U.S., supra,* 112 S.Ct. at 2441, 2443 (Justice White, concurring and dissenting in part). As this Court has more recently and aptly observed, "State governments are neither regional offices nor administrative agencies of the Federal Government." *New York v. U.S.,* 112 S.Ct. 2408, 2434 (1992).

IV

THE ADMINISTRATIVE EXCEPTION IN THE FLSA IS APPLICABLE HERE

Inexplicably, the Department of Labor here has reversed prior decisions concerning the applicability of the FLSA to state criminal investigators. Petitioner's Brief for Certiorari at 14-16. As petitioners point out, both the Court of Claims and the Eighth Circuit have upheld the administratively construed exemption of postal inspectors. *Id.* at 14 citing *Sprague v. U.S.*, 677 F.2d 865 (Ct.Cl. 1982); *Dymond v. U.S. Postal Service*, 670 F.2d 93 (8th Cir. 1982). We have been informed that the Department of Labor has changed its position several times, classifying Rhode Island State Police and Nevada State investigators as exempt, then not exempt[2], and similarly changing its construction of the adminstrative exemption to Washington State's community corrections officers, at a cost of over one million dollars in back overtime. It is noteworthy that the investigators of the Labor Department itself have been exempted. *Id.* at 13. The absence of established and principled administrative construction only gives further credence to the mandates of *Gregory v. Ashcroft, supra,* that a showing of absolute certainty be made

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[2] The ultimate determination that special agents of the California Department of Justice fell within overtime requirements of the Act resulted in an eventual settlement of $4 million. *Nadeau v. Office of the Attorney General,* CIV-S-89-0032-LKK. An allied case involving investigators of the California Department of Forestry and Fire Protection resulted in a cost of $1.5 million to the state. *Alex v. State of California,* CIV-S-89-0032-LKK.

before it is concluded that Congress intended to apply the Act to State officers or employees. *Id.*, 111 S.Ct. at 2403.

State criminal investigators fit securely within the rules of statutory interpretation set forth in *Gregory*. While the FLSA's exemption for "administrative and professional" employees is "an odd way for Congress to exclude (them)," *Id.*, 111 S.Ct. Rptr. at 2424, the statute does not make it clear, as it must, that Congress meant the Act to cover them.

CONCLUSION

The Court's task is not an easy one. But in its recent opinions, it has shown a recognition of the need for solution. As federal mandates increase and state treasuries diminish, the inevitable conflict is one which must be resolved by the Court. The *Garcia* rule inevitably permits the national government to "devour the essentials of state sovereignty." *Maryland v. Wirtz, supra,* 392 U.S. at 205 (Douglas, J. dissenting). By revisiting the balanced and well-tried considerations in *Usery*, its predecessors and its progeny, the Court can give effect to the Tenth Amendment's provisions, "not to create a sacred province of state autonomy but to ensure that the unique benefits of a federal system . . . not be lost through undue federal interference with certain core state functions." *EEOC v. Wyoming*, 460 U.S. 226, 236 (1983). There is a pressing need for application of the principle that, as this Court

observed in *New York v. U.S.*, 112 S.Ct. at 2434, "States are not mere political subdivisions of the United States."

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No. 93-797

In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF NEW YORK, ET AL., PETITIONERS

v.

ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether investigators employed by the New York State Bureau of Criminal Investigation are "administrative" employees exempt from the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. 213(a)(1).

2. Whether the Tenth Amendment bars application of the FLSA's overtime provisions to BCI investigators.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 3 F.3d 581. The opinion of the district court (Pet. App. 22a-41a) is reported at 807 F. Supp. 919.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1993. The petition for a writ of certiorari was filed on November 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 207(a)(1), requires an employer to pay each of its employees "at a rate not less than one and one-half times the regular rate at which he is employed" for any hours worked in excess of 40 hours per week. With exceptions not relevant here, that provision covers state employers and employees. See 29 U.S.C. 203(d), (e)(2)(C) and (x); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985). Section 13(a)(1) of the Act, 29 U.S.C. 213(a)(1), provides an exemption from the Act's overtime requirements for any employee "employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])."

The Secretary has promulgated regulations that define the scope of the exemption for "administrative" employees. 29 C.F.R. Pt. 541. Under the regulatory test applicable to the employees in this case, see Pet. App. 30a, an employer need not pay statutory overtime to any employee whose "primary duty" consists of "[t]he performance of office or nonmanual work directly related to management policies or general business operations of [the] employer or [the] employer's customers," so long as that work also "includes work requiring the exercise of discretion and independent judgment." 29 C.F.R. 541.2(a)(1) and (e)(2). The Secretary's interpretative regulation codified at 29 C.F.R. 541.205(a)[1] elaborates on

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[1] The general regulations set forth in Subpart A of Part 541, 29 C.F.R. 541.0-541.52, are legislative regulations promulgated in accordance with the notice-and-comment provisions of the Administrative Procedure Act. See, *e.g.*, 14 Fed. Reg. 7705-7707 (1949). The interpretative regulations set forth in Subpart B, 29 C.F.R.

the requirements of the applicable test by defining work "directly related to management policies or general business operations of [the] employer" as "those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work." 29 C.F.R. 541.205(a).

2. Petitioner the State of New York administers, as a division of its Executive Department, the New York State Police. Pet. App. 8a. The mission of the State Police is "to prevent and detect crime and apprehend criminals." N.Y. Exec. Law § 223 (McKinney 1993); see Pet. App. 8a, 37a. Some members of the State Police, including the employees at issue here, are assigned to the Bureau of Criminal Investigation (BCI) for purposes of "preventing, investigating and detecting violations of the criminal laws of the state, and conducting such other investigations as may be provided for by law." N.Y. Exec. Law § 216 (McKinney 1993); see Pet. App. 8a. BCI Investigators hold the lowest rank within the BCI, after Captains, Lieutenants and Senior Investigators. Pet. App. 9a. They "investigate crime scenes, gather evidence, interview witnesses, interrogate and fingerprint suspects, make arrests, conduct surveillance, obtain search warrants, and testify in court." *Ibid.* Investigators "enjoy broad discretion in the conduct of their investigations, including the decision whether to make an arrest." *Ibid.*

Before entry of the district court's injunction in this case (see Pet. 3 n.4), petitioner did not compensate BCI Investigators for overtime hours at the rate of one and one-half times their regular rate of pay, as required by

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541.99-541.602, contain "statements of general policy and interpretations directly related to the regulations" in Subpart A. 14 Fed. Reg. 7707, 7730 (1949).

the FLSA for non-exempt employees. Investigators instead received premium pay in addition to their salary. Pet. App. at 9a-10a, 38a.

3. The Secretary brought suit seeking to require the State to comply with the overtime and recordkeeping provisions of the FLSA with respect to BCI's Investigators and Senior Investigators, and to provide those personnel with back pay. Pet. App. 10a. Three groups representing Investigators and Senior Investigators filed similar actions. *Ibid.* The district court consolidated the three private actions; by informal agreement among counsel, the Secretary's suit was litigated on the same schedule. *Ibid.* Petitioner[2] defended on the grounds that its Investigators were exempt as administrative employees under Section 13(a)(1) of the Act, and that its Senior Investigators were exempt as both administrative and executive employees. Petitioner also argued that the Tenth Amendment barred application of the FLSA's overtime provisions to those employees, and that the Eleventh Amendment barred an award of back pay.

The district court granted partial summary judgment for the Secretary and the employees, holding that BCI Investigators fell outside the Act's administrative exemption.[3] Pet. App. 33a-41a. In determining that Inves-

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[2] The private actions were brought against both the State and the Superintendent of the State Police. Although the Secretary's suit was not consolidated with the private actions, the court of appeals treated the cases together, see Pet. App. 1a-6a, and the State has filed one petition for a writ of certiorari in both cases. Both for convenience and because the Secretary is formally a party to an action involving only the State, we refer to the State as "petitioner" throughout this brief.

[3] The district court denied the non-federal parties' cross-motions for summary judgment with respect to the status of Senior Investigators (Pet. App. 32a, 37a), and issues concerning those em-

tigators do not perform work "directly related to management policies or general business operations of [their] employer" within the meaning of 29 C.F.R. 541.2(a)(1), the court looked to the distinction between "production" and "administrative" activities drawn by 29 C.F.R. 541.205(a). Pet. App. 34a. Applying that distinction, the court found no dispute that "[i]n the case of the State Police, law enforcement is the service that the enterprise exists to produce." *Id.* at 37a. In that context, the court found it clear that Investigators perform "the production work of the State Police," because they "have as their primary duty the prevention, investigation, and detection of crime," not administration of the agency's "business affairs." *Id.* at 38a. The court also rejected petitioner's arguments under the Tenth and Eleventh Amendments. *Id.* at 39a-41a.

4. The court of appeals affirmed. Pet. App. 1a-21a. Recognizing that the regulations "mandate a fact-intensive inquiry into the 'primary duties' of the employees at issue" (*id.* at 11a), the court held that the district court had correctly applied the Secretary's "production/administration dichotomy" in determining that BCI Investigators are not exempt as "administrative" employees. *Id.* at 14a. The court found that, "without question," "the BCI is in the law enforcement 'business,'" and noted that it was undisputed that "the primary function of the Investigators within that business is to conduct—or 'produce'—its criminal investigations." *Ibid.*

The court rejected petitioner's argument that the distinction between production and administrative work drawn by the Secretary's regulations is "outdated, unsound and unworkable." Pet. App. 14a, 16a. The court

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ployees therefore were not before the court of appeals (see *id.* at 11a) and are not before this Court.

agreed with petitioner that interpretative regulations like Section 541.205 "are not entitled to the controlling significance of the legislative regulations themselves." Pet. App. 14a. It nonetheless found the Secretary's interpretations worthy of "considerable weight," both "because they constitute a 'body of experience and informed judgment to which courts . . . may properly resort for guidance,'" *id.* at 14a-15a (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)), and because the production/administration distinction "has repeatedly proven useful to courts in a variety of non-manufacturing settings," including governmental ones. Pet. App. 16a. In any event, the court agreed with the trial court's "ultimate determination" on the administrative exemption issue, even without reliance on the production/administration distinction. *Id.* at 15a.

The court of appeals found unpersuasive petitioner's argument that Investigators should be treated as exempt even under the production/administration test, pointing out (Pet. App. 17a) that petitioner's emphasis on the Investigators' exercise of discretion did not address their working relationship to the BCI's "management policies or general business operations" within the meaning of 29 C.F.R. 541.2(a). As to petitioner's contention that applying the Act's overtime requirements to Investigators would "impede the State's ability to fight crime," the court observed that its function was "limited to deciding the narrow question of whether the function of the BCI investigators places them within the scope of the administrative exemption to the FLSA," and suggested that "the State, of course, remains free to invoke the political processes to convince Congress and the Secretary of the correctness of its views." Pet. App. 17a.

Finally, the court of appeals rejected petitioner's arguments based on the Tenth Amendment.[4] Pet. App. 17a-19a. Reasoning that after *Garcia* v. *San Antonio Metro. Transit Authority*, *supra*, and *South Carolina* v. *Baker*, 485 U.S. 505 (1988), "the 'States must find their protection from congressional regulation through the national political process,'" the court noted that in this case the State had not alleged that it had been deprived of any right to participate in that process or "singled out in a way that left it politically isolated and powerless." Pet. App. 18a (quoting *South Carolina* v. *Baker*, 485 U.S. at 512, 513). The court recognized that *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991), "counsels that, out of respect for state sovereignty, [a court] should not interpret a federal statute in such a way as 'would upset the usual constitutional balance of federal and state power'" in the absence of a clear statement of congressional intention to do so. Pet. App. 18a (quoting *Gregory*, 111 S. Ct. at 2401). It concluded, however, that the requirement that petitioner pay overtime to BCI Investigators is not the sort of issue going to "the heart of representative government," with which *Gregory* was concerned (Pet. App. 18a (internal quotation marks omitted)), and that in any event "Congress's intent to apply the FLSA to state law enforcement agencies such as the BCI is unmistakably clear." *Id.* at 18a-19a (citing 29 U.S.C. 207(k)).

ARGUMENT

The court of appeals' decision is correct, and does not conflict with any decision of this Court or of any other court of appeals. The court applied established legal

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[4] The court also rejected petitioner's claim of Eleventh Amendment immunity from suit by the private respondents. Pet. App. 19a-21a. Petitioner expressly declines to seek review of that holding in this Court. See Pet. 8.

standards to particular facts, and its conclusions merit no further review.

1. Petitioner contends (Pet. 10-12) that the production/administration distinction drawn by the Secretary's regulations was designed for manufacturing businesses, not public employees, and is either inapplicable to BCI Investigators or arbitrary and capricious as applied to them. Courts have uniformly held, however, that "the concept of 'production' in 29 C.F.R. § 541.205(a)'s administrative/productive work dichotomy * * * is not limited to manufacturing activities." *Martin* v. *Cooper Elec. Supply Co.*, 940 F.2d 896, 903 (3d Cir. 1991), cert. denied, 112 S. Ct. 1473 (1992). As the court of appeals recognized, the distinction has "repeatedly proven useful to courts in a variety of non-manufacturing settings" (Pet. App. 16a), because it identifies those employees "whose primary duty is producing the commodity or commodities, whether goods *or services*, that the enterprise exists to produce and market." *Dalheim* v. *KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990) (emphasis added) (TV producers); see also *Cooper Elec.*, 940 F.2d at 903 (wholesale sales personnel); *Gusdonovich* v. *Business Info. Co.*, 705 F. Supp. 262, 264-265 (W.D. Pa. 1985) (private insurance investigator).

Moreover, as the court below also recognized (Pet. App. 16a), courts "have demonstrated little difficulty applying the 'production worker' analogy to employees in the public sector." In public employment, production activities are those that are "related to the primary service goal of the agency," *Smith* v. *City of Jackson*, 954 F.2d 296, 298 (5th Cir. 1992) (fire department supervisors), or involve the "day-to-day carrying out of the [agency's] affairs," *Bratt* v. *County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990) (county probation officers), cert. denied, 498 U.S. 1086 (1991). The cases do not sug-

gest that courts have encountered any more difficulty in applying the production worker test to law enforcement agencies than in applying it in any other public sector context. See, *e.g.*, *Shockley* v. *City of Newport News*, 997 F.2d 18, 28 (4th Cir. 1993) (police sergeants who work on telephone "crime line"); *Harris* v. *District of Columbia*, 741 F. Supp. 254, 260 (D.D.C. 1990) (housing inspector); see also *Adams* v. *United States*, 27 Fed. Cl. 5 (1992) (applying related Office of Personnel Management regulations to administrative exemption question involving criminal investigators employed by various federal agencies, with varying results depending on details of particular jobs involved).[5] Petitioner points to no statutory or regulatory ground for questioning the courts' consistent conclusion that the Department's production/administration test represents a permissible interpretation of the Secretary's own regulations implementing the

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[5] In addition, as petitioner points out (Pet. 15), the Labor Department's Wage and Hour Administrator's opinion in one case concluded that police officers of a municipality who had "primary responsibility for all aspects of the investigation of major crimes" are production workers of the agency and therefore cannot qualify for the administrative exemption. Op. Ltr. No. WH-529 (Feb. 1, 1988) (*reprinted at* Pet. App. 68a-70a). See also Opinion Letters of Dec. 6, 1988 (state criminal investigators); June 9, 1988 (assistant sheriff, D.A. investigator); and July 8, 1988 (state criminal investigators), all *reprinted in* G. Ginsburg, D. Abrahams & S. Boyd, *Fair Labor Standards Handbook*, App. III at 251, 218-219, 220 (1990). Because the inquiry is, by its nature, fact-intensive, the Department's application of the test does not always lead to classifying law enforcement personnel as "production" workers. See Op. Ltr. No. WH-292 (Oct. 8, 1974) (*reprinted at* Pet. App. 67a) (concluding on unspecified facts that certain public defender investigators and deputy probation officers were exempt administrative employees, but noting "questionable" status of similar but more junior employees).

FLSA. See *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993).

2. Petitioner challenges the application of the production/administration test to BCI Investigators, not by explaining the administrative nature of any of the Investigators' duties, but by contending that a variety of other, allegedly similar positions have been classified as or held to be exempt. See Pet. 12-21. Because, as the court of appeals observed (Pet. App. 11a), application of the test requires "a fact-intensive inquiry into the 'primary duties' of the employees at issue" in any given case, petitioner's approach is of questionable value. See *Dalheim* v. *KDFW-TV*, 918 F.2d at 1226; cf. *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713-714 (1986). But whatever its merits, petitioner's approach to the exemption issue in this case raises no issue of general legal significance that merits this Court's review.

a. Contrary to petitioner's assertion (Pet. 16-17), the decision below does not conflict with *Dymond* v. *United States Postal Service*, 670 F.2d 93 (8th Cir. 1982), or *Sprague* v. *United States*, 677 F.2d 865 (Ct. Cl. 1982). Those cases held that postal inspectors employed by the United States Postal Service and performing a wide range of duties were exempt administrative employees. In both cases, the Department of Labor made specific determinations that the inspectors had "administrative functions," and the courts deferred to those agency determinations. *Dymond*, 670 F.2d at 94 n.2, 96; *Sprague*, 677 F.2d at 868. In this case, by contrast, the Department's review of the functions of BCI investigators led it to the opposite conclusion, in which both courts below concurred. Pet. App. 15a-17a, 37a-38a. Moreover, the opinions in *Dymond* and *Sprague* are silent as to the particular facts of the positions involved; both courts relied on their review of materials submitted by the Postal

Service to the Department of Labor, but did not discuss their contents. There is therefore no basis for concluding that the Eighth Circuit would have reached a result different from that of the Second Circuit below if faced with the facts of this case.[6]

b. Similarly, petitioner contends at length (Pet. 12-21) that the decision in this case is inconsistent with the treatment of criminal investigators employed by a number of federal agencies. As the district court recognized (Pet. App. 27a n.4), that argument "serves only to confuse the issues."

The Office of Personnel Management (OPM) administers the FLSA with respect to federal employees. 29 U.S.C. 204(f); see Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 58 (codified at 29 U.S.C. 203(e)(2)(A)) (extending coverage of FLSA to federal employees); see also *American Fed'n of Gov't Employees* v. *OPM*, 821 F.2d 761, 769 (D.C. Cir. 1987). OPM has issued both regulations and instructions to govern application of the FLSA, including the adminis-

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[6] The petition reproduces a number of regulations relating to postal inspectors. Pet. App. 62a-66a. While we are unaware of the relationship, if any, between those regulations and the materials before the Eighth Circuit in *Dymond* and *Sprague*, we note that a number of the duties specified for postal inspectors suggest a role focused on the internal functioning and "general business operations" (see 29 C.F.R. 541.2(a)(1)) of the Postal Service, and quite different from that performed by BCI Investigators. See Pet. App. 63a-64a (Inspection Service responsible for, *e.g.*, "[p]rotecting mail matter, postal facilities, and other postal assets, employees, and people on postal premises"; "[p]erforming internal audits of postal financial and nonfinancial operations"; and performing the functions of the Inspector General of the Postal Service). Compare *Shockley* v. *City of Newport News*, 997 F.2d at 28 ("ethics and standards" officer, responsible for investigating complaints against other officers, exempt as "administrative" employee).

trative exemption, by federal employers. See 5 C.F.R. 551.201 *et seq.*, 551.205; Federal Personnel Manual System Letter 551-7 (July 1, 1975). Under OPM's administration, federal agencies classify their own employees as exempt or non-exempt in the first instance.[7] Challenges to some such classifications have been mounted by some federal law enforcement employees, with mixed results depending largely on the same sort of detailed factual analysis of job functions that characterizes non-federal FLSA cases. See, *e.g.*, *Adams* v. *United States*, 27 Fed. Cl. at 17-28. This case does not present a record—and this Court does not present a forum—that is appropriate for undertaking any such fact-bound analysis, or for considering questions raised under OPM regulations and interpretations that have no application to petitioner.[8]

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[7] Petitioner makes much (Pet. 13-14) of the fact that the Department of Labor has previously treated certain Wage and Hour Compliance Specialists as exempt employees under the FLSA. As a result of an arbitrator's ruling applying the "production worker" rule, however, the Department has reclassified most of those employees as non-exempt. See *In re United States Department of Labor and Nat'l Council of Field Labor Locals, A.F.G.E.*, No. 92-01307 (Abrams, Arb.) (Dec. 30, 1992), slip op. 25.

[8] Petitioner notes (Pet. 17-18) that exempt federal employees are entitled to receive premium pay for work that "requires substantial amounts of irregular, unscheduled overtime duty." 5 U.S.C. 5545(c)(2) (Supp. IV 1992). Contrary to petitioner's contention (Pet. 17), however, the fact that Congress has periodically raised the ceiling on the amount of premium pay available to federal employees in general, see Act of Nov. 27, 1989, Pub. L. No. 101-173, 103 Stat. 1292, and law enforcement personnel in particular, see Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, § 529, 104 Stat. 1427, reveals no general congressional intention to exempt all state and federal criminal investigators from the overtime provisions of the FLSA. It represents no more than a decision to provide increased compensation for particular

3. Finally, petitioner contends (Pet. 21-29) that application of the FLSA's overtime requirements to BCI Investigators, at least without a specific directive by Congress on that precise issue, violates petitioner's rights of sovereignty under the Tenth Amendment. The court of appeals properly rejected that contention. Pet. App. 17a-19a.

Petitioner concedes both the force of this Court's decision in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and the existence of a clear congressional intention to apply the strictures of the FLSA to state law enforcement agencies. See Pet. 24, 25-26. It limits its challenge instead to "the application and interpretation of [the] federal regulation" implementing the statute's administrative exemption (Pet. 26), and presents only the narrow question "whether Congress intended that the administrative exemption be applied in such a way as to exempt criminal investigators" (Pet. 24).[9] To resolve that question, petitioner argues (Pet. 22-22) for a sweeping application of the "plain statement" rule articulated in *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2401 (1991).

In *Gregory*, this Court was faced with the particularly sensitive question of whether Congress had intended general federal employment legislation to abrogate a

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federal employees classified by their agencies as exempt from the generally applicable overtime provisions of the FLSA.

[9] Petitioner's amici go further and suggest (Br. 13) that *Garcia* be "reexamine[d]" and, presumably, overruled. The petition presents no such question, and we do not address it further. See, *e.g.*, Pet. 26 ("*Garcia* does not control the result in this case because [petitioners] challenge the application and interpretation of a federal regulation, not the application of the FLSA generally by Congress to the States."). See *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981).

state constitutional provision defining the basic qualifications required of state judges. In that context, the Court pointed out that Congress does not lightly exercise the power to "impose its will on the States" in areas of traditional state authority. 111 S. Ct. at 2400. The Court therefore counseled that federal statutes should not be construed to "upset the usual constitutional balance of federal and state powers" in the absence of a clear statement of Congress's intent to do so. *Id.* at 2401.

As petitioner concedes, however, there is no question of statutory coverage here.[10] Whatever the implications for state governments of the imposition of the FLSA's overtime requirements on law enforcement personnel (see, *e.g.*, Pet. 23, 27),[11] Congress has struck the "constitutional balance" that it deems appropriate with respect to that issue.[12] Petitioner therefore contends, in

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[10] Pet. 24; see *Garcia*, 469 U.S. at 533; 29 U.S.C. 203(d), (e)(2)(C) and (x); 29 U.S.C. 207(k) (prescribing special overtime rules for public (including state) employees "in law enforcement activities").

[11] It is not clear that petitioner's assertions concerning the burden of providing overtime compensation for criminal investigators are factually well-founded. A 1989 study undertaken by petitioner itself concluded that 30 of the 31 States surveyed paid their investigators statutory overtime in accordance with the FLSA. C.A. App. 59-71. And a recent report of the National Advisory Commission on Law Enforcement, to which petitioner refers (Pet. 20), indicates that 89% of state and local governments surveyed paid overtime to law enforcement personnel, and that of those, 94% paid time-and-a-half for all overtime hours worked. C.A. App. 395-396.

[12] As this Court has made clear, the protection afforded the States under the Constitution lies largely in the structural role of their representatives in helping to strike the appropriate balance. See *Garcia*, 469 U.S. at 556; *South Carolina* v. *Baker*, 485 U.S. 505, 512 (1988); *Gregory*, 111 S. Ct. at 2403. As the court of appeals

effect, that not only general statutory coverage decisions made by Congress itself, but all significant regulatory implementations or interpretations of those decisions, must be independently supported by a clear and specific expression of congressional intention before they may constitutionally be applied to the States.

In applying the FLSA's provisions to the States, however, Congress also applied to them the regulatory provisions that it specifically authorized the Secretary to promulgate to implement the Act. See, *e.g.*, 29 U.S.C. 213(a)(1) (authorizing the Secretary to "defin[e] * * * from time to time by regulations" the scope of the administrative exemption); cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). Requiring a plain statutory statement to support every regulatory interpretation would effectively preclude normal administrative implementation of the FLSA (or any other federal statute) as applied to the States, and thereby frustrate Congress's clearly expressed intentions both to extend the statute's coverage to their activities, and to entrust the statute's implemen-

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noted (Pet. App. 18a), this case (like *Baker*, 485 U.S. at 513) involves no claim that petitioner or other States have been in any way inhibited from participating in congressional decisions on the scope of FLSA coverage of public employees, including law enforcement employees. Indeed, their participation and success are evident in the enactment of 29 U.S.C. 207(o), which allows state and local governments to provide compensatory time in lieu of overtime pay under certain circumstances, in order to provide relief from the financial burdens of FLSA coverage. See *Moreau* v. *Klevenhagen*, 113 S. Ct. 1905 (1993); H.R. Rep. No. 331, 99th Cong., 1st Sess. 18-19 (1985); S. Rep. No. 159, 99th Cong., 1st Sess. 7-8 (1985).

tation to the Secretary.[13] Compare *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988) (in reviewing preemption of state law by federal regulations, proper focus is on the scope of the delegation of regulatory authority to the agency; "a 'narrow focus on Congress' intent to supersede state law [is] misdirected'" (citation omitted); *Moreau* v. *Klevenhagen*, 113 S. Ct. 1905 (1993) (discussing FLSA regulations applicable to state employers without reference to a "plain statement" rule); *Biggs* v. *Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993) (subsidiary, but allegedly particularly burdensome, FLSA provisions and regulations requiring prompt payment may constitutionally be applied to State without contravening *Gregory*), cert. denied, No. 93-772 (Jan. 18, 1994). The court of appeals was therefore correct to reject petitioner's argument under the Tenth Amendment, and its decision on that point warrants no further review.

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[13] Petitioner stresses (Pet. 26-27) the fact that the applicable interpretative regulations were promulgated prior to application of the FLSA to state employees. That sequence, however, cuts against petitioner's position, because Congress is presumed to be aware of published interpretations when it reenacts (or, as here, extends) a statute. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379 (1982). Apart from ratification, the timing of the Secretary's interpretations is relevant at most to determining the degree of deference properly accorded them. Cf. *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 257-258 (1991). In this case, the court of appeals made clear that it relied on the Secretary's interpretative regulations because it found them persuasive, and because they had "repeatedly proven useful" in applying the administrative exemption in both public and private contexts. And it made clear as well that even if it had found the regulations unpersuasive, it would nonetheless have agreed with the district court's (and the Secretary's) "ultimate determination" of coverage on the facts of this case. Pet. App. 15a-16a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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